The Central Law Journal.

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CURRENT EVENTS.

JURISDICTION OF FEDERAL COURTS — REMOVAL OF CAUSES.—We will publish in the next number of the JOURNAL the full text of the act of Congress recently passed, the object of which is to "amend the act of congress approved March 3, 1875, entitled 'an act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purpose.'"

In publishing this statute, as in the publication of the Interstate Commerce Law,[1] we shall make an exception to our general rule, and we do so for the self-same reason, the great importance of the legislation to the profession and to the public at large. In the statute which we will present to our readers, the law controlling the jurisdiction of federal courts, and especially the very important and rather intricate branch of it touching removal of causes from State courts, is very seriously modified. We think that, in furnishing the full text of that statute to our readers, we will contribute very greatly to their convenience, as the means of ready reference to the law on this subject is indispensable to every practitioner who may be interested in matters connected with federal courts.

[1] *Ante*, vol. 24, p. 152.

ENGLISH LAND TENURES—A NEW DEPARTURE.— We clip the following remarkable paragraph from a very recent London cablegram to a newspaper. Under the heading of "A bold scheme," the correspondent says: Lord Halsbury, lord high chancellor, has introduced in the upper house a bold scheme regulating land transfer, which indicates the rapid progress made during recent years in ideas concerning the tenure of land. Mr. Labouchere himself has hardly asked for any more radical innovation upon England's time-honored land-holding system than is contained in this measure which abolishes primogeniture, prohibits entail, makes the real estate of intestates personal property, and compels registration as a condition of land transfer or mortgage. A few years ago, before proposals for land nationalization had any respectable footing whatever, such a measure as this would have been sufficient to cause the instantaneous fall of any ministry which should have ventured to propose it. To-day it is regarded as a comparatively mild and even too long-delayed reform."

We are not a little surprised that such propositions should have been made in the English parliament, and especially that they should have emanated from the highest law officer of a conservative ministry, and been propounded in the house of lords. From our standpoint they are not unreasonable. We have long since been cured of the maladies of primogeniture and entail, and have achieved, in nearly, or quite all the States, a reasonably judicious system of registration of land transfers and mortgages, but in abolishing the distinction, *quoad* the estates of intestates, between real and personal property, Lord Halsbury is somewhat ahead, we believe, of the most advanced of our States. We must be permitted to doubt whether Lord Halsbury's propositions are accurately reported; if they are, we are quite sure that he will speedily discover that he has been, to say the least, premature, and that neither the English parliament, nor especially the house of lords are at all prepared for so sweeping a reformation.

PRISONERS AS WITNESSES—IN ENGLAND.— We learn from our exchanges that Lord Bramwell is actively engaged in engineering in the house of lords a bill to authorize prisoners to testify in their own behalf. The *London Law Times*, after commending the general scope and probable effect of the bill, says: "The fifth clause of the bill, to which Lord Esher objects, provides that a prisoner shall not be cross-examined as to any previous convictions. But we fail to appreciate Lord Esher's objection. Evidence from the dock under any circumstances would always be received by a jury with reserve, but the admission by a prisoner of a previous conviction would, in nine cases out of ten, ruin his chance of acquittal, and completely defeat

the object of the act. A prisoner, although innocent of the immediate crime charged against him, would hesitate to give evidence, however important his evidence to his case might be, if he knew that he ran the risk of having to admit a previous conviction."

Pretermitting the rather *naive* idea implied in this extract that the object of the bill is to secure acquittals, we think that a prisoner who has been previously convicted of crime, and, having any option in the matter, is fool enough, or sufficiently ill-advised, to essay to testify in his own behalf, may, if the law permits cross-examination at all, be cross-examined "for all he is worth," as to previous convictions and anything else that might tend to discredit or to convict him.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS — REMITTING INDICTMENT—ARRESTING JUDGMENT.—We have long been persuaded that the constitution, and relations to each other, of the Circuit and District Courts of the United States are very faulty, and obnoxious to grave criticism. A striking confirmation of this opinion is to be found in the report of a case first in the district, then in the circuit, and last in the District Court of the United States for the District of Massachusetts.[1] The facts were, that Haynes was indicted in the district court for using the United States mail in the perpetration of what the court very justly called "an abominable cheat." He proposed, through the mails, to send, by mail, for certain very small sums of money, pieces of silk "suitable for making and repairing dresses." In replying to the numerous remittances which he received, he "kept the word of promise to the ear but broke it to the hope." He sent little pieces of sewing silk thread, instead of remnants of silk cloth, "none less than seven-eighths of a yard in length" which the disappointed bargain-hunters fondly hoped to receive. He was duly convicted, and, after verdict, filed a motion in arrest of judgment. At this stage of the proceedings the district attorney, instead of moving for judgment, for some occult reason moved to remit the indictment to the circuit court under U. S. Rev. Stat. § 1037. The case was accordingly remitted to the circuit court where the motion in arrest of judgment was overruled. Later, however, the circuit court decided that the district court could not, under the statute cited, remit the cause after verdict to the circuit court. Holding, therefore, that it had no jurisdiction of the cause, the circuit court, strangely enough, sustained a motion to arrest the judgment, and that ended the proceedings in the circuit court.

The district attorney afterwards applied to the district court for a warrant for the arrest of Haynes, and upon the hearing the court delivered an elaborate opinion in which the facts are stated and the proceedings of both courts fully detailed. It was held that, in arresting the judgment, the circuit court made a mistake; that it erred in holding that the district court in remitting the cause violated the seventh amendment of the constitution of the United States, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The district court concluded that, as the circuit court had disclaimed jurisdiction, the case had never in effect left its own jurisdiction; that it had as full cognizance of the case as if the district attorney had never made his mysterious motion to remit, and, therefore, ordered the issuance of a warrant for the arrest of the defendant.

The "moral" of this story is, that there is something radically wrong in a system under which two respectable courts could, by any possibility, create such a complication in an ordinary case of plain swindling, and that under any merely sensible administration of justice, the culprit should have been, long ago, immured in a State prison.

[1] United States v. Ayres, U. S. D. C. (Mass.), Jan. 22, 1887; 29 Fed. Rep. 691.

SUB-LESSEES AND COVENANTS IN LEASES.

Sub-Lessee's General Liability. — It is familiar law that a tenant for years has a right to underlet for so long as his interest continues, unless restrained therefrom by some covenant or condition in the lease;[1] but

[1] See Pike v. Eyre, 9 Barn. & C. 909; King v. Ald-

that there is no privity of estate between the original lessor and the sublessee, and that the latter is not liable to the former for the rent reserved in the first lease;[2] in fact, that he is liable only to his immediate lessor for the payment of rent and the performance of covenants.[3]

While the assignment of a lease carries the whole interest in the term, an under-lease still reserves to the lessee some portion, however small, of that interest;[4] and the material distinction between the two is this: That while a certain privity of estate subsists between the original lessor and the assignee of the lessee, so as to render the latter liable on some of the covenants, there is no privity whatever between the original lessor and an under-lessee;[5] and hence the under-lessee cannot be sued by the original lessor upon any covenant contained in the lease,[6] and no covenants entered into by the original lessee are binding upon the under-tenant, although they may be covenants running with the land, such as to pay rent, or to keep in repair.[7] To render one liable on a covenant as assignee he must take an assignment of the whole, or of a part of the premises for the whole term;[8] for, although an assignee of the lessee would be bound, a sub-lessee would not, nor would the assignee of such sub-lessee.[9]

Assignment and Under-Lease.—A tenant for years, unless restrained by his lease, may assign over his interest, whether the term is in possession or is to commence in future,[10] or he may underlet (Boone on Real Property, p. 88) for so long a time as his interest continues (see opening portion of preceding subdivision); but to constitute an assignment, the entire interest of the lessee in all the premises included in the assignment must pass to the assignee.[11] If he parts with his entire interest, he has made a complete assignment; if he has transferred his entire interest in a part of the premises, he has made an assignment *pro tanto*;[12] and although the instrument may be in form a sublease, yet, if it conveys the whole estate, it will operate as an assignment,[13] but if the lessee retains a reversion in himself, he has made a sublease;[14] and when he leased a part of the premises for the remainder of his term, with easements in the other part, this was held to be an under-lease and not an assignment.[15] A lessor, by taking an assignment from his lessee, after the latter has sublet the premises, is not relieved of liability to the sublessee upon covenants contained in the original lease.[16]

Express and Implied Covenants.—Covenants in a lease are either such as are inserted in express terms, or are incident to the relation of lessor and lessee (see Mart. on Conv., § 343, p. 283), and, therefore, to be implied;[17] and the latter are known as "usual

borough, East, 597; Jackson v. Harrison, 17 Johns. (N. Y.) 66, 70; Roberts v. Geis, 2 Daly (N. Y.), 535; Den v. Post, 25 N. J. L. 285.

[2] Jennings v. Alexander, 1 Hilt. (N. Y.) 154; Dartmouth College v. Clough, 8 N. H. 22; McFarlan v. Watson, 3 N. Y. 286; Amsby v. Woodward, 9 Dowl. & R. 536. Compare Peck v. Ingersoll, 7 N. Y. 528.

[3] Harvey v. McGraw, 44 Tex. 412. See for source of paragraph, Boone on Real Prop. §§ 88, 101.

[4] 1 Sch. on Per. Prop. § 36. And see Martindale on Conveyancing, § 313, p. 267, citing Tayl. on Land. and Ten. 81; Palmer v. Edwards, 1 Doug. 187.

[5] 1 Sch. on Per. Prop. § 36.

[6] See Tayl. on Land. and Ten. §§ 16, 108, 109, and cases cited; Doe v. Bateman, 2 B. & A. 168; Doe v. Byron, 1 Com. B. 623, 626; Davis v. Morris, 36 N. Y. 569.

[7] Martindale on Conveyancing, § 313, p. 267, making citations next noted; Halford v. Hatch, 1 Doug. 183; McFarlan v. Watson, 3 N. Y. 286; Dartmouth College v. Clough, 8 N. H. 22; Grundin v. Carter, 99 Mass., 16.

[8] See citations in next note; also Dunlap v. Bullard, 131 Mass., 161. Compare Townsend v. Reed, 15 Abb. N. Cas. 285, 286.

[9] Bedford v. Terhune, 30 N. Y. 460; Patton v. Deshon, 1 Gray, 329; Norman v. Wells, 17 Wend. 136; so cited, Martindale on Conveyancing, § 349, p. 289.

[10] Robinson v. Perry, 21 Ga. 183; and see Beear v. Flues, 64 N. Y. 520.

[11] Van Rensselaer v. Gallup, 5 Denio (N. Y.), 454; Indianapolis, etc. v. Cleveland, etc. R. R. Co., 45 Ind. 281; McNeil v. Kendall, 128 Mass. 245; s. c., 35 Am. Rep. 373.

[12] Woodhull v. Rosenthal, 61 N. Y. 391.

[13] Bedford v. Terhune, 30 N. Y. 457; McNeil v. Kendall, 128 Mass. 245; s. c., 35 Am. Rep. 373; Parmenter v. Webber, 8 Taunt. 593; Langford v. Selmes, 3 Kay & J. 229.

[14] Woodhull v. Rosenthal, 61 N. Y. 391; Collins v. Hasbrouck, 56 N. Y. 157; Smiley v. Van Winkle, 6 Cal. 605; Constantine v. Wake, 1 Sweeney (N. Y.) 239; Davis v. Morris, 36 N. Y. 569. See Martin v. O'Connor, 43 Barb. 522.

[15] McNeil v. Kendall, 128 Mass. 245; s. c., 35 Am. Rep. 373. See Boone on Real Prop. § 88, whence foregoing points and authorities derived.

[16] Bailey v. Richardson (Cal.), 5 Pac. Rep. 910.

[17] See Hamilton v. Wright, 28 Mo. 199; Mayor, etc. v. Mabie, 13 N. Y. 160; Tone v. Brace, 8 Paige, 597; Ross v. Dysart, 33 Pa. St. 452; Surplice v. Farnsworth, 7 Man. & G. 584; Bishop of St. Albans v. Battersley, L. R. 3 Q. B. Div. 359; s. c., 28 Eng. Rep. 314; Williams v. Burrell, 1 Com. B. 429; A breach of the covenants of a lease does not work a forfeiture of the

covenants," which may be exacted independently of positive stipulation;[18] as, for instance, a covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease;[19] but when a lease is drawn technically in form, and with obvious attention to details, a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended.[20] And if the lessor and lessee agree that a lease shall be drawn containing the ordinary covenants, such covenants do not embrace a covenant that the lessee shall personally occupy the premises, or that he will not cultivate the land by his agents or employees.[21] There is no implied covenant in a lease of a building for a particular use, that it is suitable for that use, or that it is safe and well built;[22] nor in a lease of dwelling, that it is fit for habitation;[23] and the lessor is not bound to pay for improvements made by the lessee during his term, in the absence of an express agreement so to do;[24] but the payment of all taxes and assessments upon the premises is usually imposed by law upon the lessor.[25]

The usual covenants to be found in a lease for any term of years at the present day, are these:[26] *First*, on the part of the lessor, covenants for quiet enjoyment, against incumbrances, for further assurance, to repair, to renew the lease, and to pay taxes and assessments. *Second*, on the part of the lessee, covenants to repair, to pay rent, to pay taxes and assessments, to insure, not to assign, to reside on the premises, to build after a certain pattern, against carrying on certain trades, for particular modes of cultivation, and to re-deliver fixtures.[27]

Covenant for Quiet Enjoyment.—It is an implied undertaking on the part of the grantor that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted;[28] but he does not warrant against mere trespassers (Boone on Real Prop., § 103), nor agree to put the lessee into possession;[29] though the covenant is held to be broken if the lessee is prevented from entering by a person who had title at the date of the lease.[30] The landlord must indemnify the tenant against losses resulting from the breach of the implied covenant for quiet enjoyment, since the law takes it for granted that every lessor has both the will and the power to keep his lessee in peaceable possession of the whole premises;[31] but at the same time the tenant must do his part, and he cannot expect indemnity unless he has been actually or constructively[32] driven from the premises.[33] Where there is an express covenant for quiet enjoyment, none other of the same character will be implied.[34]

Covenant to Repair.—The obligation of a landlord to repair demised premises rests solely upon express contract, and a covenant to repair will not be implied;[35] nor if the

term, in the absence of a stipulation to that effect: Vanatta v. Brewer, 32 N. J. Eq., 268.

[18] Wilkins v. Fry, 2 Swanst. 249; Bennett v. Womack, 7 Barn. & C. 627; Hodgkinson v. Crowe, Hawk. 10 Ch. 622; s. c., 14 Eng. Rep. 823; Clark v. Clark, 49 Cal. 586.

[19] Eldred v. Healey, 31 Wis. 546; Edwards v. Perkins, 7 Oreg. 149; Mack v. Patchin, 42 N. Y. 167; s. c., 1 Am. Rep. 506; Berrington v. Casey, 78 Ill. 317; Bundy v. Cartwright, 8 Ex. 913.

[20] Bruce v. Fulton Nat. Bank, 16 Hun, 615; s. c., 79 N. Y. 154: s. c., 35 Am. Rep. 505. See Boone on Real Prop. § 103, whence paragraph derived.

[21] Clark v. Clark, 49 Cal. 586, 589.

[22] Libby v. Talford, 48 Me. 3, 6; Jaffe v. Harteau, 56 N. Y. 398; s. c., 15 Am. Rep. 438. And see Clark v. Babcock, 23 Mich. 164. Compare Edwards v. New York, etc. R. R. Co., 25 Hun, 635.

[23] Foster v. Peyser, 9 Cush. 242.

[24] Howard v. Doolittle, 3 Duer (N. Y.), 464; Mumford v. Brown, 6 Cowen (N. Y.), 475; Weigall v. Waters, 6 Term, 488. See Connor v. Jones, 28 Cal. 59; Van Cortland v. Underhill, 17 Johns. (N. Y.) 405.

[25] Dawson v. Hinton, 5 Barn. & Ald. 521; Jones v. Morris, 3 Ex. 742. Source of paragraph: Boone on Real Prop. § 102.

[26] 1 Sch. on Per. Prop. § 29.

[27] See Tayl. on Land. and Ten. §§ 219, 313, and cases cited. Assignability of guaranty of lease with covenant for rent and other covenants: Potter v. Grunbeak (Ill.) 7 N. E. Rep. 586.

[28] Dexter v. Manley, 4 Cush. 24; Wells v. Mason, 4 Scam. (Ill.) 84; Baugher v. Wilkins, 16 Md. 35; Coddington v. Dunham, 45 How. Pr. 40.

[29] Playter v. Cunningham, 21 Cal. 229; Mechanics, etc. Ins. Co. v. Scott, 2 Hilt. (N. Y.) 550; Grist v. Hodges, 3 Dev. (N. C.) 200; Moore v. Weber, 71 Pa. St. 429; s. c., 10 Am. Rep. 708.

[30] Scott v. Rutherford, 92 U. S. 107; Grannis v. Clark, 8 Cowen (N. Y.) 36. But compare Gans v. Vanderveer, 34 N. J. L. 293.

[31] 1 Sch. on Per. Prop. § 30.

[32] What will amount to constructive eviction: see earlier and later cases cited in Tayl. on Land. and Ten. § 308; also Bennett v. Atherton, L. R. 7 Q. B. 3, 6; Merryman v. Bourne, 9 Wall. 592.

[33] Holder v. Taylor, Hol. 12; Hart v. Windsor, 12 Mess. & W. 85; Vernon v. Smith, Taunt. 329; Smith on Land. and Ten. 206; also cited, 1 Sch. on Per. Prop. 30.

[34] Burr v. Stenton, 43 N. Y. 462; as noted, Boone on Real Prop. § 103.

[35] Clancy v. Byrne, 56 N. Y. 129; McAlpin v. Powell,

leased premises should be destroyed by fire, can the landlord be compelled to rebuild or repair for the benefit of the tenant, unless he has expressly covenanted to do so;[36] and equity will not enforce the specific performance of a covenant in a lease, on the part of the lessor, to repair damages by fire.[37]

But a lessor may bind himself by express covenant to repair the demised premises, and if there be a reservation in the lease of the right to enter and make improvements, he is bound to make the necessary repairs without notice so to do;[38] though if he fails to make the repairs, the lessee is not thereby released from paying rent, nor is he justified in abandoning possession of the premises, but he may sue for a breach of the covenant to repair;[39] and a covenant to "make all necessary repairs" binds the landlord to restore the premises to their original condition as regards fitness for the business for which they were leased.[40]

Covenant for Renewal of Lease.—A covenant for the renewal of a lease, to be valid, must be reasonably definite and certain, both as to the term and amount of rent;[41] and a covenant on the part of the lessor for a new lease at the expiration of the term, without a corresponding covenant on the part of the lessee to accept it,[42] does not bind the lessee to accept.[43] Covenants for continued renewals are not favored, for the reason that they tend to create perpetuities;[44] but when their validity is recognized, they will be specifically enforced, if clearly expressed.[45] A lease of premises used by a firm for copartnership purposes, made to one of the co-partners, does not authorize him to renew the same for his use only, but the renewal inures to the benefit of the firm,[46] and a covenant to renew at the option of the lessee, makes it necessary for him to declare his election at the expiration of his current term.[47]

Lessee's Covenants.—On the part of the lessee there are implied covenants, such as to pay rent,[48] to make tenantable repairs, and to use the premises in a proper and tenant-like manner;[49] and the words yielding and paying a stipulated sum, will raise a covenant to pay rent;[50] while in a parole demise there is held to be an implied contract on the part of the tenant that at the expiration of the tenancy he will deliver up vacant possession of the premises to the landlord.[51] The liability of a tenant to repair is usually fixed by express covenant,[52] which, if general, merely binds him to see that the tenement does not suffer greater injury than the usual operations of

70 N. Y. 126; S. C., 26 Am. Rep. 555: Kramer v. Cook, 7 Gray, 553; Morse v. Muddix, 17 Mo. 569; Arden v. Pullen, 10 Mees. & W. 321; Sauer v. Bilton, L. R. 7 Ch. Div. 815; S. C., 25 Eng. Rep. 34.

[36] Doupe v. Gerin, 45 N. Y. 119; Beach v. Farish, 4 Cal. 151; S. C., 2 Am. Rep. 430; Sheets v. Selden, 7 Wall. 423. But compare Harrington v. Watson (Oreg.) 3 Pac. Rep. 173. Nor will an express covenant be enlarged by construction; Witty v. Matthews, 52 N. Y. 512; Mills v. Baehr, 24 Wend. 254.

[37] Beck v. Allison, 56 N. Y. 336; S. C., 15 Am. Rep. 430. Source of paragraph, Boone on Real Prop. § 103. Compare generally, 1 Sch. on Per. Prop. § 30, p. 34.

[38] Allen v. Culver, 3 Denio (N. Y.), 204; Hayden v. Bradley, 6 Gray, 425. Compare Makin v. Watkinson, to Law J. Ex. 25; 40 Law J. Ex. 33.

[39] Spickles v. Sax, 1 E. D. Smith (N. Y.) 253: Tibbetts v. Percy, 24 Barb. 39. And see Cowell v. Lumley, 39 Cal. 151; S. C., 2 Am. Rep. 430; Welles v. Castele, 3 Gray, 325; Wall v. Hinds, 4 *Id.* 256; Van Every v. Ogg, 59 Cal. 56.

[40] Ward v. Kelsey, 38 N. Y. 80. And see Flynn v. Hatton, 4 Daly, 552; S. C., 45 How. Pr. 333; Boone on Real Prop. § 102, whence paragraph derived. Effect of special stipulations and provisions: 1 Sch. on Per. Prop. § 30, p. 34.

[41] Cunningham v. Pattee, 99 Mass. 248; Pray v. Clark, 113 Mass. 283; Brown v. Parsons, 22 Mich. 24; Amst v. Alexander, 44 Mo. 25; Norton v. Snyder, 2 Hun (N. Y.), 82.

[42] Boone on Real Prop. § 103.

[43] Bruce v. Fulton Nat. Bank, 79 N. Y. 154; S. C., 35 Am. Rep. 505.

[44] Burynham v. Grey's Hospital, 3 Ves. 295; Atty. Gen'l v. Brooke, 18 *Id.* 326; Rutgers v. Hunter, 6 Johns. Ch. (N. Y.) 215; Banker v. Braker, 9 Abb. N. Cas. (N. Y.) 411.

[45] Willan v. Willan, 16 Ves. 84; Whitlock v. Duffield, 1 Hoff. Ch. (N. Y.) 110; Blackmore v. Boardman, 28 Mo. 420. Source of this and next paragraph: Boone on Real Prop. § 103. Need of precise wording and disfavor shown to continued renewals: 1 Sch. on Per. Prop. § 30, p. 34, making succeeding citations; Tayl. on Land. and Ten. §§ 332-340, and cases cited; Fumival v. Crew, 3 Atk. 83; 4 Kent. Com. 109, and cases cited; Rutgers v. Hunter, 6 Johns. Ch. 215; Hyde v. Skinner, 2 P. Wms. 196. And see Eaton v. Lynn, 3 Ves. 690.

[46] Mitchell v. Read, 84 N. Y. 556.

[47] Renard v. Duskam, 34 Conn. 512; Thiebard v. Nat Bank, 42 Ind. 212. Compare Reed v. St. Johns, 2 Daly, 213.

[48] Van Rensallaer v. Smith, 27 Barb. 140; Lynch v. Onondaga Salt Co., 64 Barb. 550; Kimpton v. Walker, 9 Vt. 198.

[49] Lynch v. Onondaga Salt Co., 64 Barb. 558; Nave v. Berry, 22 Ala., 382.

[50] Iggulden v. May, 9 Ves. 330; Wolveridge v. Stewart, 3 Tyrw. 687; S. C., 1 Cromp. & M. 644; Van Rensalaer v. Smith, 27 Barb. 140.

[51] Henderson v. Squire, 10 Best & Smith, 183. Source of paragraph: Boone on Real Prop. § 103. Lessee's covenants discussed: Sch. on Per. Prop. §§ 31-32.

[52] Gutteridge v. Munyard, 7 Car. & P. 129; Stanley v. Twogood, 3 Bing. N. Cas. 4.

nature will cause to a building of its age and condition; while an express and unconditional covenant to repair and keep in repairs binds him to rebuild in case of destruction by fire or other accident;[53] and an exception in a covenant to repair, of damages by the elements or the act of God, will not include damages to which human agency in any way contributed;[54] but a lessee of a wooden building, covenanting to rebuild in case of fire, is released by the enactment of a valid ordinance prohibiting the erection of a wooden building.[55] The lessee may bind himself by covenant to pay taxes, assessments or other charges on the property;[56] but his liability in such case must not be extended[57] beyond the reasonable meaning of the terms employed.[58]

Covenants Running with the Land.—Of covenants in a lease, some run with the land, while others are only binding upon the person.[59] A covenant to pay taxes runs with the land[60] and binds the assignees of the term;[61] and the same is true of a covenant to insure[62] to reside on the premises,[63] to repair, or to deliver up in good condition;[64] while covenants for quiet enjoyment[65] to pay rent,[66] and implied covenants generally,[67] are likewise of this character;[68] but an assignee cannot be held liable for the breach of covenant committed before he became such.[69]

JAMES P. OLIVER.

Chicago, Ill.

[53] Ross v. Overton, 3 Call. (Va.) 309; s. c., 2 Am. Dec. 522; Scott v. Scott, 18 Gratt. (Va.) 166; Schmidt v. Pettit, 1 McArthur (Dist. Columbia), 179; Abby v. Billups, 35 Miss. 618; Hoy v. Holt, 91 Pa. St. 88; s. c., 36 Am. Rep. 659; Monk v. Noyes, 1 Car. & P. 265.

[54] Polack v. Ploche, 35 Cal. 416.

[55] Cordes v. Miller, 39 Mich. 581; s. c., 33 Am. Rep. 430. See Boone on Real Prop. § 103.

[56] Trinity Church v. Higgins, 48 N. Y. 532. Compare Sapsford v. Fletcher, 4 Term, 511; Garner v. Hannah, 6 Duer. 262; Wall v. Hinds, 4 Gray, 256; Paul v. Chickering, 117 Mass. 265.

[57] Boone on Real Prop. § 103.

[58] Love v. Howard, 6 R. I. 116; Codman v. Johnson, 104 Mass. 491; Shepardson v. Elmore, 19 Wis. 424; Jeffray v. Neals, Law R. 6 Com. P. 240.

[59] 1 Sch. on Per. Prop. § 29.

[60] See Tayl. on Land. and Ten. § 260 *et seq;* Barn. L. Dist. 14th, 2d, 405.

[61] Post v. Kearney, 1 Sandf. (N. Y.) 105; s. c., 2 N. Y. 394; Astor v. Miller, 2 Paige (N. Y.), 68.

[62] Doe v. Peck, 1 Barn. & Adol. 428.

[63] Doe v. Lockwood, 8 East, 185; Paten v. Chaplin, 2 Henry Blackstone, 133.

[64] Dean of Windsor's Case, 5 Rep. 24; Demorest v. Willard, 8 Cowen (N. Y.), 206.

[65] Markland v. Crump, 1 Dev. & B. (N. C.) 94; Shelton v. Codman, 3 Cush. 318.

[66] Graves v. Porter, 11 Barb. 592; Jacques v. Short, 20 *Id.* 269; Hurst v. Rodney, 1 Wash. C. C. 375; Howland v. Coffin, 12 Pick. 125. See also Noonan v. Orton, 4 Wis. 342; Hunt v. Danforth, 2 Curt. (U. S. Cir. Ct.) 392.

[67] Boone on Real Prop. § 103. And see 1 Sch. on Per. Prop. § 33; Tayl. on Land. and Ten. § 260 *et seq.*

[68] See Fletcher v. McFarlane, 12 Mass. 43; Harvey v. McGraw, 44 Tex. 412; Smyth v. North, Law 7 Ex. 242.

[69] Paul v. Norse, 8 Barn. & C. 486; Culbertson v. Irving, 4 Hurl. & N, 742; Harley v. King, 2 Cromp. M. & R. 22; Johnson v. Sherman, 15 Cal. 287; Kain v. Hoxie, 2 Hilt. (N. Y.) 311; Hintze v. Thomas, 7 Md. 346; Patten v. Deshon, 1 Gray, 329.

EVIDENCE—STATUTE OF FRAUDS—CORPORATION—AGENCY—VENDOR AND VENDEE.

KICKLAND V. MENASHA, ETC. CO.

Supreme Court of Wisconsin, January 11, 1887.

1. *Evidence—Parol Evidence to Vary—Consideration.*—The terms of a deed as to the amount of the consideration may be changed by parol.

2. *Act of Agent—Effect of Ratification.*—Where an agent has authority to make the contract of purchase of land, and agrees to pay an additional consideration to that recited in the deed of the land purchased, the principal is liable for such additional consideration, if he accepts the deed.

3. *Sale—Apportionment.*—Where A agrees to pay a certain amount, additional to the consideration recited in a deed to him of land, upon a sale by him of such land, and he subsequently sells it and other property for a gross sum, the amount to be paid to A's vendee is determined by apportioning the amount received, according to the comparative value of the two tracts.

ORTON, J., delivered the opinion of the court:

In 1878, one E. D. Smith was director and superintendent, and one Henry Hewitt, Jr., was director, of the defendant company. Hewitt, on behalf of the company, negotiated a bargain with the plaintiff for the purchase from him of a strip of land one rod wide, lying along the Wisconsin river, including lakes and bayous leading into the river, for rafting and booming purposes, on lots 1 and 2, in section 15, township 24, range 7 east, for the use of said company; and Smith, on behalf of said company, consummated said bargain, by paying the said plaintiff down $100, and by receiving a deed of conveyance to said company from said plaintiff of said premises. The said $100 was the nominal consideration in said deed, but it was a part of said bargain that, in addition to said $100 named in the deed, and as a part of the consideration of said purchase, whenever and at such time as the said company shall sell said premises, it shall pay to said plaintiff one-half of the excess it shall receive, as the consideration of such sale, over and above said $100, after deducting from the excess costs, expenses, and improve-

ments, as the whole of said consideration. About the same time the company so purchased of the said plaintiff and so agreed, it purchased of one Jessie Martin and one John Riches a tract of land of about 10 acres adjoining the premises so purchased of the plaintiff, by and through the agency of said E. D. Smith, and on behalf of the company; and it was agreed that $300 should be the nominal consideration of the conveyance thereof, but that whenever the company should sell said land, it should pay to them one-half of the consideration of such sale over and above said $300, deducting costs, expenses, and improvements, which, together with the said $300 paid and named in said conveyance, should constitute the full consideration of said purchase; and the company received a deed of said Martin and Riches for that consideration, and on such condition, which, in effect, was the same agreement as to a future sale of the premises as the one made between the company and the plaintiff. The said Smith had said deeds duly acknowledged and recorded, and the company entered into possession of the premises. In 1882, the company, without making any improvements upon the premises purchased of the plaintiff, but having made some improvements on the premises purchased of said Martin and Riches, sold the whole of both of said premises to the Webster Manufacturing Company for $2,000, and the purchase money was paid into its treasury. This deed was executed by E. D. Smith as the then president, and by H. S. Smith, as the secretary, of the company. The contingency upon which the balance of the purchase money has become due and payable having transpired, the plaintiff now demands judgment for one-half of the amount for which said premises so conveyed by him to the company was sold in excess of said $100, and deducting costs, expenses, and improvements, if any, to be ascertained by the proportionate value of the two premises or tracts of land so sold and conveyed to the company, which sum so demanded he alleges to be $300. These are substantially the facts proved.

In disposing of the questions raised on this appeal, it will be unnecessary to specially refer to the several errors complained of in admitting evidence, in instructing the jury, or in refusals to instruct as asked by the appellant; for the questions arise upon the mere statement of the facts, and are not difficult of solution. In the order in which these questions are discussed in the brief of the learned counsel of the appellant, they are—

First. That the terms of the deed as to the amount of the consideration cannot be changed by parol. There was formerly some conflict in the authorities upon this question, but since the case of Hannan v. Oxly, 23 Wis. 519, it has not been an open question in this State. It was there held "that parol proof may be given to show an additional consideration not inconsistent with the deed." See authorities cited in the opinion. This case has been frequently followed by this court. Horner v. Railway Co., 38 Wis. 165; De Forrest v. Holum, *Id.* 516.

Second. That this agreement to pay more than the consideration named in the deed is void by the statute of frauds. It is not perceived how this question can be raised in such a case. The deed is valid as a conveyance of the land, and the respondent does not seek to impeach it, or to change it in any manner as a valid conveyance. He only seeks to prove by parol what was the whole consideration of the sale, and that a considerable part thereof has not been paid. A promise to pay money, supported by a sufficient consideration, cannot be held void because it was in parol, most certainly; and this was all the respondent sought to show. There is consideration expressed in the deed sufficient to support it, and take it out of the statute. The additional consideration of the sale not paid, whether resting in parol or in writing, cannot affect the deed as a valid conveyance under the statute in any respect. It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same, or some part of it, remains unpaid, though not thereby to impeach the title conveyed by the deed. 3 Washb. Real Prop. (3d ed.) 327; Kimball v. Walker, 30 Ill. 510; Villers v. Beamont, 2 Dyer, 146; Phil. Ev. 482; Elden v. Seymour, 8 Conn. 304; cases cited in respondent's brief. But the cases above cited from our own court are sufficient. The learned counsel of the appellant admits, and cites cases to that effect, that parol evidence that the consideration named and receipted in the deed has not been paid, may be proper; citing Shephard v. Little, 14 Johns. 210. Although in that case it was only sought to prove that the consideration named in the deed had not been paid, yet Judge Spencer, in his opinion, cites the case of a lease, where parol evidence was held admissible to prove an additional rent to be paid by the tenant beyond that expressed in the lease, and he says, near the close of the opinion, that "although you cannot by parol substantially vary or contradict a written contract, yet these principles are inapplicable to a case where the payment or amount of the consideration becomes a materal inquiry." This language is repeated by Judge Woodworth in a similar case of Bown v. Bell, 20 Johns. 338. The case of McCrea v. Purmort, 16 Wend. 460, also cited by the learned counsel of the appellant, was one where the clause in the deed, acknowledging the receipt of a certain sum of money as the consideration of the conveyance, was held open to explanation, by proof in parol, that the consideration was to be paid in bar iron at a stipulated price. In Wilkinson v. Scott, 17 Mass. 249, it was held that the receipt or acknowledgment of the payment of the consideration in a deed was only *prima facie* or presumptive evidence of it, and was open to explanation by parol; and that it was not a case within the statute of frauds, because it was not a contract for the sale of land; that that contract was executed and finished by the deed; and that it was only a

demand for money arising out of the contract. If proving that no part of the consideration had been paid, against the receipt in the deed, and acknowledgment by the deed that it had been paid, is proper, as the learned counsel admits, although so far in contradiction of the deed itself, how much more proper to prove an additional consideration not expressed or receipted in the deed. But enough on these two first points. See 2 Phil. Ev. 655, marginal, and cases cited in note 2.

Third. That the said E. D. Smith, who consummated this contract of purchase, had no authority from the corporation to act as its agent in doing so, and especially had no authority to make the agreement to pay the plaintiff such additional consideration for the purchase. It is not strenuously insisted that he did not have authority to purchase the premises for the consideration named in the deed. It could not be reasonably so claimed, for the corporation defendant received all the fruits of the purchase, and sold and conveyed the premises at a large profit to the Webster Manufacturing Company, and received the consideration, and in the most positive manner ratified and assumed the acts of the pretended agent Smith, in making such purchase, and paying the consideration named in the deed, and in the taking of the conveyance to the company. But it is claimed that, there being no proof that the company ever had any notice of the promise to pay this additional consideration, it therefore could not and has not ratified it. The ratification of the acts of the agent in any particular transaction is equivalent to his having prior authority from the principal to do them. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* It follows, then, that this case must be treated as if E. D. Smith, the director, had original authority from the corporation to make this purchase, so far as any act of his is apparent on the face of the deed. But this is not the full extent of the agent's authority. He had authority to make the bargain or the contract of purchase which preceded the deed, and which was executed, at least in part, by the conveyance of the premises. And a part of such bargain was that the company should pay this additional consideration.

Had the company any right to assume, from a mere knowledge of the deed, that its agent had not agreed to pay any additional consideration? If it had, then the consideration named in the deed is conclusive, and not merely *prima facie* or presumptively the whole amount. But we have seen that other and additional consideration may rest in a *parol* promise. Does it not follow that, the company having given the agent authority to make the purchase, such authority extended to the amount of consideration to be paid, even beyond that named in the deed?

The legal rule is that the principal is not only liable for the acts of the agent in the main transaction, but for his acts, representations, declarations or admissions within the scope of the authority confided to him respecting the subject-matter, if done or made at the same time, and constituting a part of the *res gestæ*. Story Ag. § 134, and authorities in note 1. "An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts." *Id.* § 136, and note. Such agreement or acts may be the very inducement of the contract of sale. An example is given by the author of this principle, familiar from its frequent occurrence. Thus, for example, what an agent represented at the time of the sale of a horse, which sale was authorized by his master, whether it be a representation or a warranty of soundness, or of any other quality, will be binding upon the master. *Id.* § 137.

Suppose the master is not informed of anything but the sale. Is he not bound? Mundorff v. Wickersham, 63 Pa. St. 87. In this case the plaintiff had lent the defendant a note, at the request and by the authority of the defendant's agent, and delivered it to such agent for the defendant, and at the time it was so delivered the agent, without any direct or special authority to do so from the defendant, signed a receipt for his principal, agreeing to protect the note at maturity. The defendant, as principal, was held bound by the agreement, and liable.

But, again, "it is a general rule that, when a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent." So a debtor cannot have the benefit of a compromise and release effected by his agent with his creditors, without adopting all the representations made by the agent to the creditors in negotiating the same. Ferguson v. Carrington, 9 Barn. & C. 59; Corning v. Southland, 3 Hill, 552; and other cases in note 1 to section 250, Story, Ag. This principle is irrespective of notice to the principal, or want of notice as to some part of the contract. But, even in respect to notice, notice of facts to an agent is constructive notice thereof to the principal himself, when it arises from or is connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still, the principal, having intrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal. *Id.* § 140, and note 1.

In the application of these principles, what was the subject-matter and the *res gestæ*, and what was the scope of the agency of E. D. Smith, in making the purchase, and taking the deed of the plaintiff's land and privileges for the use of the company? Was it not the whole agreement, and its terms and conditions? It must be conceded that Smith had authority to pay the $100, and receive the deed. But this was not the whole of the subject-matter of the transaction or of the *res gestæ*, or the scope of the contract. There was a promise to pay more than the $100 named in the deed, and which may be presumed to have consti-

tuted, at least to a great extent, the inducement of the sale. It must be held that the company is bound to pay this additional consideration, because (1) it was a material part of the bargain the agent was authorized to make; (2) the company is bound by the act or promise of the agent within the scope of the main transaction, which was authorized or ratified by the company, and such a promise was part of the *res gestæ*; (3) the ratification of a part is a ratification of the whole of that particular transaction of the agent; (4) notice to or knowledge of facts by the agent is constructive notice thereof to the principal himself, when it arises from or is connected with the subject-matter of the agency, and it is presumed that the agent has communicated such facts to the principal, and, if he has not, the principal having intrusted his business to the agent, the other party has the right to deem his acts and knowledge obligatory upon the principal; (5) where a corporation has received the benefit of a contract, it must perform its part of it (De Groff v. American L. T. Co., 21 N. Y. 127); (6) when a party deals with a corporation in good faith, in respect to matters concerning which it has conferred authority upon the agent, and is unaware of any defect of authority or other irregularity on the part of the agent, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity exist (Gano v. Railway Co., 60 Wis. 12; S. C. 17 N. W. Rep. 15; Merchants' Bank v. State, Bank, 10 Wall. 604); (7) the company having accepted the benefit of the contract, and retained the property, or sold it and received the purchase money, and retained it as the fruits of the contract, it must carry out all the terms of the contract, and pay the full amount of the purchase money agreed to be paid therefor by its agent. (Scott v. Railroad Co., 86 N. Y. 200; Le Neve v. Le Neve, 3 Atk. 655.)

The only other question to be considered is whether the method adopted by the circuit court, by instruction to the jury, and in the admission of evidence, by apportionment upon the comparative value of both tracts of land included in the deed of the company to the Webster Manufacturing Company, was the proper manner of ascertaining the amount for which the tract sold and conveyed by the plaintiff to the company was sold for. It was the fault of the company that it sold both tracts together and conveyed them by the same deed, for a consideration in gross. This has made such as apportionment absolutely necessary. It cannot be ascertained for what the premises sold by the plaintiff was sold for by the company in any other known way. In such a case, apportionment is the proper method. 1 Bouv. Law Dict. tit. "Apportionment." It is the only method of determining the amounts which each of several parties interested in an estate shall pay toward the removal of an incumbrance on the whole. 1 Washb. Real Prop. 96, 534. It is the only method of ascertaining the damages in case of a breach of the covenant of seizin as to a part only of the premises conveyed. Hall v. Gale, 20 Wis. 292; Noonan v. Ilsley, 21 Wis. 138. There is no more difficulty in apportioning this excess received by the company, between the plaintiff and Martin and Riches, than in any other apportionment. There is no mathematical certainty in any apportionment, for it depends upon comparative values, but it is as near certainty as possible.

This cause was evidently very ably tried, and the rulings of the court seem to have been deliberate and judicious. We do not think there is any error in the record that is material, and the verdict appears to be just and supported by the evidence. The judgment of the circuit court is affirmed.

NOTE.—*Parol Evidence to Vary Writing — General Rule.*—Parol evidence is inadmissible to vary or contradict the terms of a valid written instrument in any suit between the parties or privies thereto. Parol evidence, in this connection, includes that which is prior to, as well as that contemporaneous with, the making of the writing.[1] The rule does not apply to third parties.[2] Mere receipts for money are not conclusive, the rule is not extended to them.[3] Nor is it admissible to prove by parol what was the understanding of the parties to an instrument as to its meaning.[4] The writing must speak for itself, and its meaning be declared by the courts.[5] Nor can evidence be introduced to explain a patent ambiguity.[6] For note on distinction between patent and latent ambiguity, see 2 Phil on Ev. (5th Am. ed.) ch. 8.

The reason of the rule, rejecting parol evidence to vary a writing, as given by the authorities, is that, the parties having put their engagement in writing, it is presumed that they have expressed therein their whole intent and agreement, "removing them in this manner from the number of debatable questions and bad faith, or the treacherous tenure of 'slippery memory.'" It follows as a natural consequence that, if the instrument does not fairly represent the intention of the parties, the rule does not apply.[7] Thus, also, it is admissible to explain a latent ambiguity.[8] So, also, evidence of any custom is admissible to aid in

1 Best on Ev. 230; 1 Greenl. on Ev. § 275; Frost v. Brigham, 139 Mass. 43; Brown v. Spoffard, 95 U. S. 474; Fay v. Gray, 124 Mass. 500; Brandon v. Morse, 48 Vt. 322; Koehring v. Muemminghoff, 61 Mo. 403; Hogey v. Hill, 75 Pa. St. 108; Bayard v. Malcolm, 1 Johns. 467.

2 Murphy v. Peoples' Railway Co., 15 Mo. App. 595; Dempsey v. Kipp, 61 N. Y. 471; Langdon v. Langdon, 4 Gray, 186; Burns v. Thompson, 91 Ind. 146; People v. Anderson, 44 Cal. 65; Cordes v. Straszer, 8 Mo. App. 61.

3 Carpenter v. Jamison, 75 Mo. 285 Ellicott v. Barnes, 31 Kan. 170; Ditch v. Vollhardt, 82 Ill. 134; Nelson v. Weeks, 111 Mass. 223; Grinnell v. Spink, 128 Mass. 25; Stapleton v. King, 33 Iowa, 28.

4 Willmering v. McGaughey, 30 Iowa, 205; Johnson v. Granage, 45 Mich. 14; Bigelow v. Collamore, 5 Cush. 226; Brewster v. Pottruff, 55 Mich. 129; Couch v. Woodruff, 63 Ala. 446.

5 Cooper v. Whitmer (Pa.), 6 Atl. Rep. 571.

6 Brandon v. Leddy, 67 Cal. 43; Hannel v. Smith, 15 Ohio, 134; Hutton v. Arnett, 51 Ill. 198.

7 Bradshaw v. Combs, 102 Ill. 428; Hope v. Balen, 58 N. Y. 380.

8 Smith v. Aiken, 75 Ala. 209; Keller v. Webb, 125 Mass. 88; Barrett v. Stow, 15 Ill. 423; Hart v. Hammett, 18 Vt. 127; Marshall v. Gridley, 46 Ill. 247.

the interpretation of the meaning of the language, and to ascertain the extent of the contract, the parties being supposed to contract in reference thereto.[9] The meaning of technical words may be defined and explained, and the signification of signs may be given by parol evidence.[10] A contract is to be read in the light of surrounding circumstances, and, therefore, the nature, etc., of the subject-matter thereof may be shown.[11] So, also, the identity of the party effected may be proved by parol.[12]

In numerous other cases the application of the rule would work hardship and protect practices which it is not the policy of the law to allow. In such cases, circumstances affording a reason for relief at law or in equity may be shown to avoid the operation or effect of the instrument in its present form. Thus, it is held "that a written agreement may be modified, explained or reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it."[13] Where fraud or misrepresentation entered into the procuration of the instrument, it may be shown by parol.[14]

Naturally, where a party is legally incapacitated from making an agreement, it is competent for that person to prove such legal incapacity. To hold otherwise would be to nullify the law, which makes his contracts void or voidable, as the case may be.[15]

In a vast number of cases the courts have gone further, and, owing to the circumstances attendant, have allowed the instrument to be contradicted. Thus, it has frequently been held that a deed which, on its face, appears to be absolute, was meant to be a mortgage.[16] It was formerly held that this could only be done in cases of fraud, accident or mistake, and where neither of these could be shown, the absolute deed could not be shown to be a mortgage. "But it has been decided in the Supreme Court of the United States that, where a deed was *intended* to operate as a mortgage, it would be a fraudulent act on the part of the grantee to insist upon its being absolute, and on that ground the grantors would be entitled to relief."[17]

So, also, the payment of the consideration acknowledged in a deed may be contradicted.[18] As is said in the case of Kimball v. Walker, the only operation of the acknowledgment of the receipt of the money consideration expressed in the deed, "is to prevent a resulting trust in the grantor, and to estop him forever to deny the deed for the uses mentioned in it. It does not technically vary the deed, if that be the only operation of the acknowledgment of a consideration. The fact that the deed was upon a certain consideration, cannot be denied, but the other fact, that the money was paid, may be."

The decision in the principal case, where it is held that an additional consideration to that mentioned in the instrument may be proved by parol, is supported by a host of decisions.[19] There was some conflict of authority on this point, but it is in the earlier cases, the opinion there expressed that, while it was not competent to show that there was a different consideration from that shown in the deed, though you might deny that it was not paid.[20] But the weight of opinion, as shown by the autnorities above cited, clearly is that the amount named is only *prima facie* evidence of what was paid, and the true consideration may be shown. The principle that the grantee may prove that no consideration at all has been paid, and yet cannot prove the true consideration, as being in violation of the rule rejecting parol evidence, is manifestly inconsistent, since, in the latter case, there is no greater variation than in the former.

WALTER M. HEZEL.

9 1 Greenl. on Ev. § 292; Ocean Steamship Co. v. McAlpine, 69 Ga. 437; Page v. Cole, 120 Mass. 37; Fitzsimmons v. Academy of Christian Brothers, 81 Mo. 37; Collender v. Dinsmore, 55 N. Y. 204; Johnson v. Ins. Co. 39 Wis. 87.

10 Bryan v. Harrison 76 N. C. 360; Keller v. Webb, 125 Mass. 89; 66 Mo. 63; Miller v. Stevens, 102 Mass. 365; Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516; Collender v. Dinsmore, 55 N. Y. 200.

11 Reed v. Ins. Co., 95 U. S. 23; Sikes v. Shows, 74 Ala. 382; Ullmann v. Babcock, 63 Tex. 68; Bergin v. Williams, 138 Mass. 544; Ammonette v. Montaigue, 63 Mo. 201; Shewalter v. Pirner, 55 Mo. 218; Cornwell v. Cornwell, 91 Ill. 414; Campbell v. Short, 35 La. Ann. 447; Bell v. Prewitt, 62 Ill. 261.

12 Bartlett v. Remington, 55 N. H. 364; Mobberly v. Mobberly, 60 Md. 376.

13 Cullmans v. Lindsay, 6 Atl. Rep. 333; Juniata Building Assn. v. Hetzel, 103 Pa. St. 507; Barclay v. Wainwright, 86 Pa. St. 191; Walker v. France, 5 Atl. Rep. 208.

14 Baldwin v. Burrows, 95 Ind. 81; Childs v. Dobbins, 61 Iowa, 109; Meyer v. Huncke, 55 N. Y. 412. 222

15 Wiley v. Ewalt, 66 Ill. 26; Staples v. Wellington, 58 Me. 453; Phelan v. Gardner, 43 Cal. 306.]

16 Villa v. Rodriguez, 12 Wall. 323; [Campbell v. Dearborn, 109 Mass. 130; Pierce v. Robinson, 13 Cal. 116; Heath v. Williams, 30 Ind. 495; O'Neill v. Capelle, 62 Mo. 202; Carr v. Carr, 52 N. Y. 251; Wilcox v. Bates, 26 Wis. 465; Bartling v. Biasuhn, 102 Ill. 441.

17 Babcock v. Wyman, 19 How. 289; Morgan v. Shinn, 15 Wall. 139; 2 Washb. on Real Prop. 58; Bispham on Eq. § 155.

18 Rockwell v. Brown, 54 N. Y. 213; McCrea v. Purmot, 16 Wend. 468; Kimball v. Walker, 30 Ill. 511; Belden v. Seymour, 8 Conn. 318; Harvey v. Alexander, 1 Rand. 219.

19 Rabsuhl v. Lack, 35 Mo. 316; Drury v. Imp. Co., 13 Allen, 316; Paige v. Sherman, 6 Gray, 511; Harper v. Perry, 28 Iowa, 63; Pierce v. Brew, 43 Vt. 292; Gibson v. Tifer, 21 Tex. 260; Barter v. Greenleaf, 65 Me. 405; Parker v. Foy, 43 Miss. 260; Morris Canal Co. v. Ryerson, 21 N. J. L. 467: Belden v. Seymour, 8 Conn. 310.

20 Shephard v. Little, 14 Johns. 210.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACCOUNT — Executor — Appeal — Exceptions — Statutes.——An executor who pays a claim before allowance of it takes upon himself the burden of proving the same. Construction of Rev. Stat. Ill. ch. 3,§§ 70, 72, 73. An executor who pays off a mortgage from proceeds of land, sold under a power conferred by the will, should charge himself only with the balance after deducting such payment. Rules in Illinois as to appeals, exceptions and assignments of errors.—*Millard v. Harris*, S. C. Ill., Jan. 24, 1887; 10 N. E. Rep. 387.

2. ADMIRALTY—Appeal—Accord and Satisfaction—Evidence.——In admiralty proceedings, an appeal having been taken, the liability of the sureties may be compromised. An appeal is sufficient evidence of a dispute to authorize accord and satisfaction. The receipt to the sureties cannot be varied by parol evidence of an additional condition.—*Boffenger v. Tuyes*, U. S. S. C., Jan. 31, 1887; 7 S. C. Rep. 529.

3. ADVERSE POSSESSION —Streets—Buildings.—— Where a house has stood for twenty-five years projecting on the street, and the public have accepted and used the street during that time as bounded by the house, the owner has acquired title by adverse possession of the ground intruded upon by the building.—*City of Big Rapid v. Comstock*, S. C. Mich., Feb. 10, 1887; 31 N. W. Rep. 811.

4. APPEAL.——New York statutes concerning appeals construed.—*Jones v. Jones*, N. Y. Ct. App., Jan. 18, 1887; 10 N. E. Rep. 269.

5. APPEAL—Practice—Statute.——A judgment is interlocutory if a reference is necessary after it. New York statutes concerning practice on appeal construed. —*Kelsey v. Sargent*, N. Y. Ct. App., Jan. 25, 1887; 10 N. E. Rep. 269.

6. APPEAL — Remand— Mandamus.——After, upon appeal, a judgment has been rendered which is to be executed only upon conditions, and the case has been remanded, and an execution has been issued, although the conditions have not been complied with, a district judge will not be restrained by *mandamus* or prohibition from enjoining the execution of such judgment. A like ruling upon rehearing.—*State ex rel. v. Monroe, Judge*, S. C. La., Jan. 3, 1887; 1 South. Rep. 300, 303.

7. ARMY AND NAVY—Marine Corps.——The marine corps is a military body belonging primarily to the navy. Service in it is to be regarded on questions of longevity pay, as service in the army or navy.—*United States v. Dunn*, U. S. S. C., Feb. 7, 1887; 7 S. C. Rep. 507.

8. ASSIGNMENT—Creditors—Change of Possession—Validity.——An assignment for the benefit of creditors is not fraudulent in law on account of intention of possession by assignor, under Missouri law.—*Burkett v. Thombury*, S. C. Mo., Jan. 31, 1887; 2 S. W. Rep. 838.

9. ASSIGNMENT — Creditors — Preferences —Texas Law—Bond of Assignee.——All assignments in Texas for the benefit of creditors are governed by the State law, regardless of whether the debtor so intended, and all preferences are invalid. The giving bond by assignee is not a condition precedent to the taking effect of the assignment.—*Fant v. Elsbury*, S. C. Tex., Jan. 11, 1887; 2 S. W. Rep. 866.

10. ASSIGNMENT — Creditors — Assignee —Appeal. ——Creditors who are brought into a suit by another creditor against the assignee on which judgment is given for plaintiff, but on appeal by such creditors is reversed as to them, can enforce their prior garnishment against the assignee, though the assignee did not appeal from the other judgment.—*Lovernburg v. Nat. Bk. of Texas*, S. C. Tex., Jan. 21, 1887; 2 S. W. Rep. 874.

11. ASSUMPSIT—Complaint.——A complaint is good on demurrer which alleges that defendant, a church, was indebted and had borrowed money from the plaintiff, although it also claims that defendant is liable on a note and mortgage executed by other persons.—*Second, etc. Church v. Furber*, S. C. Ind., Feb. 2, 1887; 10 N. E. Rep. 118.

12. ATTACHMENT — Dissolution — Judgment and Levy.——The fact that the plaintiff, after the dissolution of his attachment, obtains judgment in his suit and levies on the goods attached, does not affect the right to determine that the legality of the original issue of the writ.—*Detroit Free Press Co. v. Dro. K. & K.*, S. C. Mich. Jan. 27, 1887; 31 N. W. Rep. 537.

13. ATTACHMENT—Priority— Practice.——In Florida, judgments entered on the same rule-day are satisfied *pro rata*, although the attachments upon which they are founded were issued and levied at different times.—*Smith v. Bowden*, S. C. Fla., Jan. 14, 1887; 1 South. Rep. 314.

14. ATTACHMENT — Wrongful — Exemplary Damages.——To authorize exemplary damages for a wrongful attachment, it must be shown to have been without probable cause and also with malicious intent to injure the plaintiff.—*Kauffman v. Babcock*, S. C. Tex., Jan. 18, 1887; 2 S. W. Rep. 878.

15. ATTORNEY — Employment — Partnership.—— Where a partnership employs an attorney for the firm, his employment ceases at a termination of the firm, though the business may continue.—*Lochrane v. Stewart*, Ky. Ct. App., Jan. 27, 1887; 2 S. W. Rep. 903.

16. BANKRUPTCY — Land Omitted — Title.——A bankrupt cannot claim title to land omitted from his schedule, though the assignee asserts no title to it, from one claiming adversely.—*Malone v. Martin*, Ky. Ct. App., Feb. 5, 1887; 2 S. W. Rep. 909.

17. BILLS AND NOTES—Material Alteration.——The insertion of the words "or bearer" is not a material alteration of a promissory note.—*Weaver v. Bromley*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 839.

18. BILLS AND NOTES—Order—Refusal—Acceptance by Another.——An order payable on demand is not subject to acceptance, and an unauthorized acceptance thereof by an agent of the payee only binds the agent individually.—*Sweet v. Swift*, S. C. Mich., Feb. 10, 1887; 31 N.W. Rep. 767.

19. BILLS AND NOTES—Promissory Notes Purchase—Last Day of Grace — Action — Common Counts — Plea.——A purchaser of a promissory note at any time on the last day of grace, before it is actually dishonored is a purchaser before maturity. A plea of the general issue in an action containing only the common counts raises the issue of a guaranty in favor of one so sued.—*Johnson v. Glover*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 214.

20. BOND—PLEADING——Where a bond was signed by the defendant as a surety, upon condition that others were to sign it, and until it was so signed it was not to be delivered, but it being delivered without those signatures he had a good defense to the suit upon the bond. A replication to his plea of *non est factum*, that defendant signed the instrument, without reading, thinking it was, as represented to him by his principal, a mere recommendation, is bad on demurrer as a departure from the complaint.—*Smith v. Kerkland*. S. C. Ala., Feb. 21, 1887; 1 South. Rep. 276.

21. BONDS— To Stay Proceedings — Condition.—— The sureties on a bond, given to stay proceedings on a judgment, are not alone bound by the recitals therein, but also by the condition therein relative to the results of an appeal.—*Miner v. Rogers*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 845.

22. CARRIERS—Goods—Connecting Lines.——A railroad is not liable for the negligence of other carriers beyond its terminus, unless it contracted to carry the goods beyond its own line, and the mere receipt of goods so marked does not import such a contract.—*Ortt v. Minneapolis, etc. R. Co.*, S. C. Minn., Feb. 4, 1887; 31 N. W. Rep. 519.

23. CARRIERS— Passengers —Tickets—Liability.—— Where a passenger buys a ticket from an authorized agent of the carrier, and states the facts, the conductor must take the statement as true, without proof to the contrary, without regard to marks on the ticket, and the company is liable if the conductor tries to eject the passenger for not paying his fare.—*Hufford v. G. R., etc. R. Co.*, S. C. Mich., Feb. 3, 1887; 31 N. W. Rep. 544.

24. CHATTEL MORTGAGES — Description — Attachments.——A chattel mortgage of a part of a large number of cattle, not separating them from the mass, is void against an attaching creditor. A separation after making the mortgage will not avail, unless there was an agreement at the time the mortgage was made that it shall apply to those cattle.—*Price v. McComas*, S. C. Neb., Feb. 9, 1887; 31 N. W. Rep. 511.

25. CHATTEL MORTGAGE—Partial Assignee—Intervention in Replevin.——An assignee of certain notes, secured by a chattel mortgage, may intervene in a suit of replevin by the mortgagee for the goods.—*Harman v. Barhydt*, S. C. Neb., Jan. 6, 1887; 31 N. W. Rep. 488.

26. COLLISION.——Ruling on a collision between a ferry-boat and a tug.—*Brown v. The Columbia*, U. S. D. C. (N. Y.), Jan. 31, 1887; 29 Fed. Rep. 716.

27. COMPROMISE—Consideration.——Where a party objected to articles furnished, but after the time limited, but gave an explanation for his delay, and the creditor offered to take a less sum, with the *proviso* that he should receive full pay if the articles were subsequently found satisfactory, he was held to be bound by the compromise.—*Richardson, etc. Co. v. Ind. Dist. of Hampton*, S. C. Iowa, March 2, 1887; 31 N. W. Rep. 871.

28. CONSPIRACY—Post-office —Fraud — Statute.—— Conspiracy defined. What constitutes use of mails to defraud. U. S. Rev. Stat. § 5480, concerning use of mails for the purpose of defrauding, construed.—*United States v. Wooten*, U. S. D. C. (S. Car.), Jan. 18, 1887; 29 Fed. Rep. 702.

29. CONSTITUTIONAL LAW — Eminent Domain — Vacation of Streets—Damages—Statutes.——The legal "vacating" of streets by a city is not a "taking" or "damaging" of private property, within the provisions of the Illinois constitution. When non-adjacent property owner is not entitled to damages. Illinois statute, July 1, 1874.—*City of East St. Louis v. O'Flynn*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 395.

30. CONTRACT—Change—Estoppel.——Where A was to receive pay as determined in a certain mode, but that by agreement was changed, though A received pay *pro tanto* under the first mode, he was not estopped from asserting his rights under the changed contract.—*Nelson v. Hagen*, S. C. Iowa, March 1, 1887; 31 N. W. Rep. 875.

31. CONTRACT — Successful Competitor.—— Where an architect offers a plan for a building, under an offer that, if successful, he should be employed as superintendent, he has a cause of action, if he is not so employed upon the adoption of his plan.—*Walsh v. St. L. Ex. & M. H. Assn.*, S. C. Mo., Jan. 31, 1887; 2 S. W. Rep. 842.

32. CORPORATION—Forfeited Stock—Execution.—— Under California law, stock bought in for unpaid assessments is not subject to an execution against the corporation.—*Robinson v. Spaulding, etc. Co.*, S. C. Cal., Feb. 17, 1887; 13 Pac. Rep. 65.

33. CORPORATION — Judgment — Satisfaction — Sequestration—Equity.—— Under Michigan law, when an execution against a corporation is returned unsatisfied, sequestration proceedings in a court of equity, and not *mandamus*, should be resorted to.—*Miner v. Trustees M. B. A.*, S. C. Mich., Feb. 10, 1887; 31 N. W. Rep. 763.

34. CORPORATION—Officers—Powers of—Disaffirmance of Contract—Release.—— Officers of a corporation who, by its by-laws, have power to make a contract, have also powers to release it. And the right to disaffirm a contract, reserved to the directors in the by-laws, must be promptly exercised. A delay of two years after the contract was made creates a presumption of ratification.—*Indianapolis, etc. Co. v. St. Louis, etc. Co.*, U. S. S. C., Jan. 31, 1887; 7 S. C. Rep. 542.

35. CORPORATION — Stockholders — Liability of — Property Bought—Subscriptions.——Where a jury find that the property of a corporation was not worth more than a fifth of that of the stock for which it was conveyed to the corporation, the incorporators are not charged with legal fraud, if it appears they made the valuation honestly. Purchasers in good faith and for value, of fully paid and non-assessable stock of a mining corporation at a very low price, are not liable for the corporation debts, even though the corporation issued the stock directly to them, instead of their vendors, to whom it had been voted.—*Young v. Erie Iron Co.*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 814.

36. CORPORATION — Bank President — Sales — Liability.—A bank president is liable to the corporation for property of the bank sold by him, unless he has authority for his act from the board of directors, the managing committee, or by usage.—*First Nat. Bk. of Central City v. Lucas*, S. C. Neb., Feb. 24, 1887; 31 N. W. Rep. 805.

37. COSTS—Depositions.——The court will not allow, as costs, attorney's fees for depositions read by stipulation, if they were taken in another case.—*Winegar v. Cohn*, U. S. C. C. (Mich.), Dec. —, 1886; 29 Fed. Rep. 676.

38. COSTS—Deposition—Witness.—When the court directs a verdict before any testimony is heard, fees are not allowed for depositions taken but not read, but when the attendance of a witness is procured without subpœna, he should be allowed his fees, although he is not called to testify.—*Cahn v. Monroe*, U. S. C. C. (Mich.), Nov. 19, 1887; 29 Fed. Rep. 675.

39. COURTS—Federal Court—Collusion.—— Federal courts will not take jurisdiction of suits primarily cognizable in State courts, when there has been collusion to give federal courts jurisdiction. Such a case is one in which a non-resident, upon pretext that a corporation, of which he is a stockholder, will not sue a city, debtor to such corporation, sues it himself, and it appears that there was collusion between the stockholder and the corporation.—*City of Quincy v. Steel*, U. S. S. C., Jan. 31, 1887; 7 S. C. Rep. 520.

40. COURTS—Jurisdiction—Mandamus.——In Louisiana, the supreme court only can issue writs of *mandamus* and other remedial writs. Other courts can only issue such writs in aid of their own jurisdiction. A prohibition, issued by a district court, addressed to a justice of the peace, is a nullity.—*State ex rel. v. Judge, etc.*, S. C. La., Jan. 3, 1887; 1 South. Rep. 281.

41. COURTS—Rock County—Appeal from Justices—Constitution.—The Rock county municipal court has exclusive jurisdiction in all appeals from justices in the county, both civil and criminal, and the act giving it is constitutional.—*Taylor v. DeCamp*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 728.

42. COURTS—State—Patents—Assignment—License.——A State court has jurisdiction, when both parties are residents of the State, to compel the assignment of a patent for an invention under implied contract therefor. Where an employee assists his employer in perfecting a machine, at the employer's expense and with his material, and then obtains a patent therefor, a license to the employer to manufacture and sell the machine will be implied.—*Fuller and J. W. Co. v. Bartlett*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 747.

43. COURTS—United States Supreme Court—Jurisdiction—Federal Question.——The Supreme Court of the United States has no jurisdiction on error or appeal from the supreme court of a State, unless it fully appears that a federal question has actually been raised and decided. If the record shows that a statute is held to be "unconstitutional," and does not show that that term is used with reference to the constitution of the United States, the Supreme Court of the United States will not take jurisdiction.—*Endowment, etc. Assn. v. State of Kansas*, U. S. S. C., Jan. 24, 1887; 7 S. C. Rep. 499.

44. CRIMINAL LAW—Amending Record—Written Instructions.——In a criminal case in Dakota, the record may be amended after the term to conform to the facts. That the record does not show the instruction is no error, in absence of proof that a request to that effect was made.—*Territory v. Christensen*, S. C. Dak., Jan. 31, 1887; 31 N. W. Rep. 847.

45. CRIMINAL LAW — Autrefois Acquit and Convict.——*Autrefois* acquit applies where the transaction is the same, and the two indictments must be sustained by the same proof. *Antrefois* convict only requires the transaction, or the facts constituting it, to be the same.—*Schubert v. State*, Tex. Ct. App., June 22, 1886; 2 S. W. Rep. 883.

46. CRIMINAL LAW—Bail—Habeas Corpus.——Evidence held insufficient to refuse bail on charge of murder.—*Ex parte Bryant*, Tex. Ct. App., June 25, 1886; 2 S. W. Rep. 891.

47. CRIMINAL LAW—Burglary — Domestic Servant.——Under Texas law; a domestic servant is one who resides in the house of his master.—*Waterhouse v. State*, Tex. Ct. App., June 25, 1886; 2 S. W. Rep. 889.

48. CRIMINAL LAW— Cattle Theft — New Trial.——Conviction was against the weight of evidence, and with the showing made a new trial should be granted.—*Wilkerson v. State*, Tex. Ct. App., June 9, 1886; 2 S. W. Rep. 857.

49. CRIMINAL LAW— Chattel Mortgage—Unlawful Sale—Description.——The indictment having particularly alleged a description of the property, it devolves upon the State to establish those allegations.—*Coleman v. State*, Tex. Ct. App., June 16, 1886; 2 S. W. Rep. 859.

50. CRIMINAL LAW — Continuance — Discretion—Affidavit of Accused.——A continuance is largely in the discretion of the trial court, and on account of the unsupported affidavit of the accused the appellate court will not grant a new trial.—*Brown v. State*, S. C. Tenn., Feb. 19, 1887; 2 S. W. Rep. 895.

51. CRIMINAL LAW— Continuance — New Trial.——Statement in application for new trial and the evidence warranted a new trial.—*Tucker v. State*, Tex. Ct. App., June 26, 1886; 2 S. W. Rep. 893.

52. CRIMINAL LAW—Counterfeiting Statute — Construction.——Construction of U. S. Rev. Stat. §§ 3708, 5188, prohibiting business cards resembling government bonds. *Quitam* action is the proper procedure, not indictment.—*United States v. Laeseki*, U. S. D. C. (Ill.), Feb. 2, 1887; 29 Fed. Rep. 699.

53. CRIMINAL LAW — Forgery — Evidence.——In a prosecution for forging an assignment of a contract, the alleged assignor having since died, the acts and conversations of the assignor and of the assignee contradicting thereto are admissible, when the signature to the assignment seems to have been traced, and the only confirmatory evidence is the testimony of two witnesses to a conversation by the assignor confirming the assignment.—*Day v. Cole*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 823.

54. CRIMINAL LAW—Forgery—Texas Law—Definition.——Pecuniary obligation in the law of forgery, in Texas, means every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be brought.—*Dooley v. State*, Tex. Ct. App., June 22, 1886; 2 S. W. Rep. 884.

55. CRIMINAL LAW — Homicide—Instructions—Degrees.——Where an instruction states by inadvertence that certain facts constitute murder in the third degree, when they constitute murder in the fourth degree, a conviction of murder in the third degree will be reversed, though another instruction gives the

proper definition of murder in the fourth degree.—*Territory v. Pirdemore*, S. C. New Mex., Jan. 29, 1887; 13 Pac. Rep. 96.

56. CRIMINAL LAW — Justice's Court — Trial—Superior Court.——Under California law, on the appeal of a criminal case, there can be no trial in the appellate court, unless there was first a trial before the justice.—*Brown v. Sup. Ct. San Benito Co.*, S. C. Cal., Feb. 10, 1887; 13 Pac. Rep. 70.

57. CRIMINAL LAW — Justices — Prosecutions —Inquiry.——An order from the prosecuting attorney allowing a prosecution before a justice of the peace is not necessary, when the prosecuting attorney himself appears in the case, under the Michigan law.—*People v. Griswold*, S. C. Mich., Feb. 3, 1887; 31 N. W. Rep. 809.

58. CRIMINAL LAW — Larceny — Evidence.——New trial granted on the weight of the evidence.—*McLaren v. State*, Tex. Ct. App., June 15, 1886; 2 S. W. Rep. 858.

59. CRIMINAL LAW —Larceny—Intent.——The evidence failed to establish the intent at the time of the taking.—*Cain v. State*, Tex. Ct. App., June 25, 1886; 2 S. W. Rep. 888.

60. CRIMINAL LAW—Larceny —Ownership.——Evidence failed to establish ownership in another than accused.—*Benton v. State*, Tex. Ct. App., June, 23, 1886; 2 S. W. Rep. 885.

61. CRIMINAL LAW — Limitations, Statute of—Absence from State.——The statute of limitations in Michigan, relative to crimes, is not set in motion by mere absence from the State, but the absence must be such as destroys residence.—*People v. McCausey*, S. C. Mich., Feb. 10, 1887; 31 N. W. Rep. 770.

62. CRIMINAL LAW — Murder — Homicide.——Sustaining as to the law of murder and homicide, the Miles' case, 18 Tex. App. 156.—*Van v. State*, Tex. Ct. App., June 25, 1886; 2 S. W. Rep. 882.

63. CRIMINAL LAW — Murder — Presumption—Instruction.——In a murder case, an instruction that the malice would be implied from the unlawful and intentional use of a dangerous weapon in a manner to produce death is correct, where there is no evidence that the killing was accidental or upon provocation.—*State v. Rainsbarger*, S. C. Iowa, March 1, 1887; 31 N. W. Rep. 865.

64. CRIMINAL LAW—New Trial—Texas Law.——Under Texas law, the granting of a new trial is as though no trial had taken place.—*Moore v. State*, Tex. Ct. App., June 25, 1886; 2 S. W. Rep. 887.

65. CRIMINAL LAW—Perjury—Indictment.——In an indictment for perjury it suffices directly to aver that materiality of the alleged false statement, or to allege facts showing its materiality.—*Partain v. State*, Tex. Ct. App., Oct. 27, 1886; 2 S. W. Rep. 854.

66. CRIMINAL LAW—Rape — Assault—Declarations. ——To be admissible, the declarations of the alleged injured party in an assault to commit rape must be contemporaneous with, and illustrative of, the attempted rape.—*McGee v. State*, Tex. Ct. App., June 25, 1886; 2 S. W. Rep. 890.

67. CRIMINAL LAW—Trial—Leading Questions.—— It is no ground for reversal that a witness, who did not speak English well, was asked leading questions on matters about which she had already testified.—*People v. Clary*, S. C. Cal., Feb. 18, 1887; 13 Pac. Rep. 77.

68. CRIMINAL LAW—Wilfully Driving Stock—Venue —Larceny.——Under indictment charging larceny, a conviction may be had for driving off stock, under Texas law, in any county, through which the stock is driven.—*McElmurray v. State*, Tex. Ct. App., June 25, 1886; 2 S. W. Rep. 892.

69. CRIMINAL LAW—Witnesses—Conspiracy—Homicide — Kentucky Law.——Where a conspiracy is charged, one of the accused can testify for another, if there is no proof of a conspiracy. Where a party break into one's house, without warrant, he may resist them to the extent of taking life if necessary.—*Wright v. Com*, Ky. Ct. App., Jan. 29, 1887; 2 S. W. Rep. 904.

70. CRIMINAL PRACTICE — Constitutional Law — Statutes.——Construction of U. S. Rev. Stat. §§ 1037, 1038. Powers of district and circuit courts to remit criminal cases from one court to the other. Powers of congress to change the jurisdiction of inferior federal courts. If a case has been improperly remitted to a circuit court it cannot arrest the judgment, or make any order settling the questions in issue.—*United States v. Haynes*, U. S. D. C. (Mass.), Jan. 22, 1887; 29 Fed. Rep. 671.

71. CUSTOMS DUTIES—Statutes — Construction—— Construction of Rev. Stat. U. S. §§ 2931, 3011, 3012, concerning recovery of duties paid on imports.—*Moller v. Merritt*, U. S. C. C. (N. Y.), Jan. 31, 1887; 29 Fed. Rep. 678.

72. CUSTOMS DUTIES — Statutes— Construction— Chemicals.——Construction of U. S. Rev. Stat. § 2499, concerning duties on chemical compounds.—*Mason v. Robertson*, U. S. C. C. (N. Y.), Jan. 27, 1887; 29 Fed. Rep. 684.

73. CUSTOMS DUTIES — Statutes — Fish.——Construction of tariff act of March 3, 1883, relative to prepared fish, pickled herrings, etc.—*Hansen v. Robertson*, U. S. C. C. (N. Y.), Jan. 21, 1887; 29 Fed. Rep. 686.

74. DEED—Quitclaim — Power.——No rights against the holder of an unrecorded deed pass by a quitclaim deed, the grantee of which has notice that his grantor had no title. A deed executed under a statutory power is not admissible in evidence, unless it appears to have been executed in pursuance of the power.—*Wine v. Woods*, S. C. Ill. Jan. 25, 1887; 10 N. E. Rep. 399.

75. DIVORCE—Desertion.——A consent which would condone a desertion, will equally neutralize the actionable character of subsequent protracted absence. —*Ford v. Ford*, S. J. C. Mass., Feb. 24, 1887; 10 N. E. Rep. 474.

76. DIVORCE—Marriage—Fraud — Pregnancy.——A marriage procured by representation by the woman to the husband, that she was pregnant by him, when in fact she was pregnant by another party, will be set aside at his petition.—*Sissung v. Sissung*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 770.

77. DRAINS — Sewers — Assessments. —— Construction of statutes of Massachusetts (Pub. Stat. Mass. ch. 50, § 4), concerning drains and sewers. When no part of the cost will be assessed to owners of lands on tributary sewers.—*Ayer v. Mayor of Somerville*, S. J. C. Mass., Feb. 24, 1887; 10 N. E. Rep. 457.

78. EJECTMENT—Color of Title—Deed—Record.—— Party claiming in ejectment under color of title must show some sort of paper title, and one claiming by virtue of adverse possession, cannot object that the deed of the opposing party is not recorded.—*Armijo v. Armijo*, S. C. N. Mex., Jan. 14, 1887; 13 Pac. Rep. 92.

79. EJECTMENT—Defenses—Tenant—Evidence.——In an action of ejectment by the purchaser at an execution sale against the defendant, the defendant may show that he delivered possession of the premises before the ejectment suit was brought to a mortgagee thereof, in accordance with Rhode Island law, and the jury may infer that defendant is in possession as tenant at will of the mortgagee.—*Wilcox v. Wilbur*, S. C. R. I., Jan. 15, 1887; 8 Atl. Rep. 78.

80. EJECTMENT — Mining Claim — Forfeiture. —— The plaintiff, in an action of ejectment for a mining claim, need only show a valid location. A forfeiture must be alleged by the party claiming it and proved.—*Renshaw v. Switzer*, S. C. Mont., Feb. 2, 1887; 13 Pac. Rep. 127.

81. ELECTIONS—Mandamus—Certificate.—— Where a party is elected to an office, has the proper certificate and has duly qualified, a *mandamus* will issue in his favor against the party holding under appointment to fill a prior vacancy, without inquiring as to preliminrry matters in the election.—*State v. Dodson*, S. C. Neb., Feb. 16, 1887; 31 N. W. Rep. 788.

82. EQUITY—Allegation—Breach of Contract—Covenant.——An allegation that a party refused to comply with his contract, which called for a demand, implies a demand and a refusal. A covenant in a deed of real estate to support the grantor is personal, and cannot be shifted to another without the grantor's assent.—*Divan v. Loomis*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 760.

83. EQUITY—Auditor's Report—Reference—Sureties—Liability.——Where the report of an auditor refers to to certain claims, which he disallows, such returns may be referred to to explain ambiguities in the report. Where a surety is released and a new one substituted, the new one is primarily liable as between the two, but both equally to the obligee.—*Case v. Sutton*, S. C. Ga., Jan. 18, 1887; 1 S. E. Rep. 175.

84. EQUITY—Cloud on Title—Attachment—Insolvent Estate.——Assignees for benefit of creditors can proceed in equity to set aside attachments on the real estate and to remove the cloud on the title, on the ground of fraud in making the attachments.—*Byles v. Rowe*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 463.

85. EQUITY—Cloud on Title—Ditch Assessment—Two Townships.——Equity has jurisdiction to set aside a void ditch assessment, which has been paid under protest. An assessment by two townships for a drainage ditch is illegal.—*Alger v. Sloght*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 531.

86. EQUITY—Decree—Appeal—Setting Aside—Evidence.——In Oregon, a decree may be attacked by a bill of review or by an original bill to set it aside, but when the evidence relied on has been considered on appeal from the decree, such decree will not be set aside in an original suit.—*Crews v. Richards*, S. C. Oreg., Jan. 25, 1887; 13 Pac. Rep. 67.

87. EQUITY—Fraud—Deed of Imbecile.——Facts on which the deed of an imbecile was set aside for fraud.—*Cole v. Cole*, S. C. Neb., Jan. 25, 1887; 31 N. W. Rep. 493.

88. EQUITY — Restraining Legal Proceeding — Defense.——Equity will not restrain legal proceedings, when the defense alleged is available at law.—*Pardridge v. Brennan*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 524.

89. ESTOPPEL—Chattel Mortgage — Execution Sale Forbidden—Notice of Sale.——Where a mortgage forbids the constable, at the time of sale by him of the mortgaged goods seized under execution, to make the sale, for reasons then specified, he is estopped afterwards in a suit of trover therefor from setting up other reasons to invalidate the sale.—*Ganong v. Green*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 461.

90. ESTOPPEL—Assertion — Homestead — Wife.—— Where a debtor deeds his homestead to his creditor, stating that he had no wife, is estopped to set up a homestead right in favor of his wife, whom he had not brought to America.—*Schwartz v. Nat. Bk. of Texas*, S. C. Tex., Jan. 11, 1887; 2 S. W. Rep. 865.

91. EVIDENCE — Admissions of Former Owner — Mortgage—Foreclosure.——In proceedings to forclose a mortgage, statements of deceased former owner are admissible in favor of plaintiffs claiming through him to show he had sold his interest to plaintiff's assignor, but are not admissible to prove that mortgagee's wife owned the note, which it is claimed has been paid to her.—*Lehman v. Sherger*, S. C. Wis., Feb. 1, 1887; 31 Rep. 733.

92. EVIDENCE — Wrongful Attachment—Credit — Plaintiff.——In a suit for damages for a wrongful attachment, it is error to allow the plaintiff to testify to the value of his credit to him at that time.—*Hernsheim v. Babcock*. S. C. Tex., Jan. 21, 1887; 2 S. W. Rep. 880.

93. EXECUTION—Justice—District Court—Motion—Prohibition.——When a justice's judgment is docketed in the district court and an execution is issued thereon, an error therein may be reached by motion to quash the execution, and not by prohibition.—*Dueheneau v. Ireland*, S. C. Utah, Feb. 2, 1887; 13 Pac. Rep. 87.

94. EXECUTORS—Bond — Assets.——Where an administrator is removed and is found indebted to the estate in a larger sum than the penalty of his bond, and his only surety is appointed administrator *de bonis non*, such surety should charge himself with the penalty of the bond as assets of the estate in his hands.—*Jacobs v. Morrow*, S. C. Neb., Feb. 16, 1887; 31 N. W. Rep. 739.

95. EXECUTORS—Checks—Death of Testator—Payment—Gifts—Insolvency.——A check payable to an executor, received at his office on account of and prior to the death of his testator, though cashed subsequently, may be credited by him on a debt due him from the deceased. An executor cannot testify to a payment of money by him to the deceased. Where the deceased gave to his executor a note he held against him, the gift will be upheld, unless at the time the deceased was insolvent or was trying to defraud his creditors.—*In re Kellogg*, N. Y. Ct. App., Jan. 18, 1887; 10 N. E. Rep. 152.

96. EXECUTORS — Claims—Loans.——Where A borrowed money from B and paid a part back, and then loaned to another an amount equal to the balance, taking the note in B's favor, the balance is provable against A's estate, though A managed the affairs of B.—*Kelly v. Strong*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 721.

97. EXECUTORS — Sales — Confirmations.——Where an administrator sells the land of the deceased to his wife and himself, goes into possession of it, and does not have it confirmed, the heirs may have it set aside.—*Woodard v. Jaggers*, S. C. Ark., Jan. 29, 1887; 2 S. W. Rep. 851.

98. EXECUTORS — Sales—Technical Errors—Collateral Impeachment.——Where the parties in interest

are before the court, a sale by an administrator will not be vitiated by mere technical errors, nor that proposed purchasers had agreed to bid so much if he obtained the order. In collateral proceedings, the true date of the executor's oath before sale may be connected by oral proof, and the findings of the probate court will not be reviewed.—*Norman v. Olney*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 555.

99. FEES—Police Judges—Cities—Counties.—Where police judges of cities receive by law the fees of justices in criminal cases, which are in some cases to be paid by the county, such judges may sue the counties for such fees, though the cities pay them regular salaries, and the law requiring them to pay over to the cities in the mode prescribed by ordinance fees collected for the use and benefit of the cities, is constitutional.—*Labour v. Polk Co.*, S. C. Iowa, March 1, 1887; 31 N. W. Rep. 873.

100. FEES—Sheriff.——Under Iowa law, a sheriff is only entitled to the one dollar for bringing a prisoner before the judge out of term time, to ten cents for each hundred words and fractions thereof of documents to be served by him, and two dollars for the service of a warrant for the seizure of intoxicating liquors.—*Painter v. Polk Co.*, S. C. Iowa, March 3, 1887; 31 N. W. Rep. 879.

101. FRAUDS—Statute of—Contract—Part Performance—Trust—Specific Performance.——A contract by which a married woman was induced to sign a mortgage of her husband's land, in consideration of a promised future conveyance to her of part of the land, is within the statute of frauds. It is not taken out by the actual execution of the mortgage nor by her continued possession. A refusal to convey land according to a parol contract is not such a fraud as will authorize a decree for specific performance, nor will it be decreed on the ground that the party refusing holds it in trust for the other.—*Green v. Groves*, S. C. Ind., Feb. 15, 1887; 10 N. E. Rep. 401.

102. FRAUDULENT CONVEYANCES — Alimony—Divorce.——A wife cannot file a bill to set aside her husband's fraudulent conveyance, made to defeat her alimony, before she has obtained her divorce and decree for alimony.—*Fein v. Fein*, S. C. Wyo., Feb. 7, 1887; 13 Pac. Rep. 79.

103. FRAUDULENT CONVEYANCES — Chattel Mortgage — Possession — Sales.——Where a debtor mortgaged his goods to a creditor, who sold them out on one day's notice, and bought them in for a grossly inadequate sum and put the mortgagor in charge for him, and received other articles or account, and no settlement between them was made: *Held*, that such mortgage was void.—*Baum v. Bosworth*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 744.

104. FRAUDULENT CONVEYANCES —Corporations—Injunctions.——An injunction to set aside a deed made by a debtor to a corporation, which it is alleged is merely the debtor, will be dissolved.—*Baker v. Naglee*, Va. Ct. App., Feb. 10, 1887; 1 S. E. Rep. 191.

105. FRAUDULENT CONVEYANCES—Mother and Son—Attachments—Replevin.——In an action of replevin by a woman for property conveyed to her by her son for a debt, which was attached as his, evidence of other transactions at the time of sale is admissible on the question of fraud between them.—*Burrill v. Kimball*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 842.

106. FRAUDULENT CONVEYANCE—Simulated Sale—Pleading—Amendment.——A simulated sale is no sale, and a creditor may disregard it and proceed accordingly. Amendment of pleadings are liberally allowed if they promote justice.—*Carter v. Farrell*, S. C. La., Jan. 3, 1887; 1 South. Rep. 279.

107. GARNISHMENT —Judgment—Venue—Pleading—Appeal.——A plea in abatement by a garnishee should show not merely that he is a non-resident, but also that no property has been attached in the proper county, and that the principal defendant has not been duly served. Suit may be brought on a judgment upon which execution might be issued. If an injunction is asked, not to affect the title to land sold, but to prevent the transfer of the purchase money notes, it is not a local action. It is a harmless error to sustain a demurrer to an argumentative denial, if the matters are included in the general denial. Upon appeal, there is a presumption in favor of the judgment.—*Becknell v. Becknell*, S. C. Ind., Feb. 15, 1887; 10 N. E. Rep. 414.

108. GARNISHMENT —Partnership—Gaming.——The creditor of a partner cannot garnish a debtor of the partnership. This rule is not affected by the fact that the debt garnished was for insurance of furniture used only for gaming purposes. Ruling as to settlement of accounts growing out of illegal or gaming transactions. The accounts may be adjudged and wound up as if their business had been legal.—*Crescent, etc. Co. v. Baer*, S. C. Fla., Jan. 14, 1887; 1 South. Rep. 318.

109. GIFT—Husband and Wife—Separate Estate—Interest.——A gift from a husband to his wife of one fourth of his estate, he then owing debts equal in amount to half of it, is not void as to his creditors. If a husband uses his wife's separate estate in the "community" business, a promise to repay it is implied. In such case interest on such property is, in Texas, only recoverable from the death of the husband.—*Richardson v. Hutchins*, S. C. Tex., Jan. 28, 1887; 3 S. W. Rep. 276.

110. GUARANTY—Consideration.——A guaranty for which there is no consideration is void. A guaranty on a mortgage by a stranger to the transaction does not bind him for the payment of the notes secured thereby.—*Briggs v. Latham*, S. C. Kan., Feb. 4, 1887; 13 Pac. Rep. 129.

111. HOMESTEADS—Partnership— Attachment.——No homestead can be set apart in partnership property against their creditor, nor can his attachment be affected by subsequent releases among the parties, so that one partner may assert a homestead right to part of the attached property.—*Lindley v. Davis*, S. C. Mon., Feb. 2, 1887; 13 Pac. Rep. 118.

112. HUSBAND AND WIFE.——Conveyances—Fraudulent Representations.——Where a husband is persuaded to join in a conveyance of his wife's property, including their homestead, by false representations of the grantee, he may maintain an action to set the deed aside.—*Farr v. Dunsmoor*, S. C. Minn., Feb. 21, 1887; 31 N. W. Rep. 858.

113. INFANCY — Disaffirmance.——An infant who, during his minority, executes a bond for title to land, and afterwards a deed for the same land to another person, and after he has arrived at full age executes a deed in pursuance of the bond, thereby disaffirms the deed which he made during his minority.—*Vallandingham v. Johnson*, Ky. Ct. App., Feb. 26, 1887; 3 S. W. Rep. 173.

114. INFANTS—Removal of Disabilities.——In Arkansas, probate courts cannot remove the disabilities

of infants seven, ten and twelve years of age, to enable them to convey land.—*Doles v. Hilton*, S. C. Ark., Feb. 19, 1887; 3 S. W. Rep. 193.

115. INJUNCTION — School District—Laches. ——A court will not grant an injunction to restrain the collection of a school-tax, on the ground of irregularities in laying off the school district, four years before the application. The plaintiff was guilty of laches.—*Slamper v. Roberts*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 214.

116. INJUNCTION—Trespass.——One who holds an equitable title will be protected by injunction against trespassers, even if the legal title is undetermined.—*Wilson v. Rockwell*, U. S. C. C. (Colo.), Dec. 15, 1887; 29 Fed. Rep. 674.

117. INSOLVENCY—Fraud—Conveyance.——A mortgage, covering in effect all the property of the mortgagor, is in fraud of the insolvency laws of Massachusetts. It is a question for the jury whether a mortgage is in the usual course of business of the debtor.—*Buffum v. Jones*, S. J. C. Mass., Feb. 24, 1887; 10 N. E. Rep. 471.

118. INSURANCE — Fire — Conditions — Waiver by Agent.——A local agent, employed to fix rates and authorize and deliver policies, subject to approval of the company, cannot waive a condition in a fire policy requiring insured to give notice at once of a loss, and within thirty days to render a particular account with the proof.—*Bowlin v. Hekla Fire Ins. Co.*, S. C. Minn., Feb. 21, 1887; 31 N. W. Rep. 859.

119. INSURANCE—Life—Exemption—Foreign Company—Suit in Another State.——The law of Ohio, exempting from claims of creditors a certain portion of insurance, taken for the benefit of his family by a married man, applies to both foreign and domestic companies, and an administrator is not bound by proceedings in another State, when he was called on to interplead by virtue of service on him of the order in Ohio.—*Cross v. Armstrong*, S. C. Ohio, Jan. 18, 1887; 10 N. E. Rep. 160.

120. INSURANCE—Life—Payable to Third Parties — Assignment.——When a policy of life insurance provides that it is payable to third parties and for their payment of the premiums, and they are called therein the assured, the party whose life is insured has no interest therein, and cannot assign it.—*Ferdon v. Canfield*, N. Y. Ct. App., Jan. 18, 1887; 10 N. E. Rep. 146.

121. INSURANCE—Life — Suicide.—— An insurance policy, to be void if the insured die by his own hand, sane or insane, does not cover the suicide by the insured while he is insane, unless the act was involuntary or the insured was unconscious at the time.—*Streeter v. W. U. M. L. A. S.*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 779.

122. INSURANCE POLICY—Holidays—Time of Payment.——A law concerning notes payable on a holiday does not affect other business. Where, by charter, a member forfeits his policy unless he pays his assessment within thirty days after notice, he is allowed thirty days after the notice ought to reach him by mail.—*Nat. Mut. B. A. v. Miller*, Ky. Ct. App., Jan. 27, 1887; 2 S. W. Rep. 900.

123. INTOXICATING LIQUORS — License—City and County.——One section of an act gave a city the exclusive right to issue licenses for the sale of liquors; another section provided that the city might reduce its area, provided that the city paid to the county one-third of all money received for such licenses. *Held*, that the city must pay over one-third of the money received from all such licenses.—*County of Brown v. City of Aberdeen*, S. C. Dak., Feb. 15, 1887; 31 N. W. Rep. 735.

124. INTOXICATING LIQUORS—Licences — Unincorporated Villages.——Under Wisconsin laws, licenses for selling intoxicating liquors in unincorporated villages must be fixed on the last enumeration, state or general, of the population of the towns in which they are.—*State v. Keaough*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 723.

125. INTOXICATING LIQUORS — Municipal Corporations—Constitutional Law.——In Indiana, municipal corporations may require persons desiring to sell liquor to take out licenses. The legislature can control the territorial jurisdiction of municipal corporations. State and county licenses to sell liquor do not prevent the city or town from exacting license fees for the exercise of the privilege within their jurisdiction.—*Lutz v. City of Crawfordville*, S. C. Ind., Feb. 16, 1887; 10 N. E. Rep. 411.

126. INTOXICATING LIQUORS—Sale—Sunday—Written Prescription. —— In Indiana a druggist, even though he is a physician, cannot sell liquor on Sunday without a written prescription.—*Tilford v. State*, S. C. Ind., Feb. 2, 1887; 10 N. E. Rep. 107.

127. INTOXICATING LIQUORS — Statute.—— Construction of Massachusetts statutes (Pub. St. Mass. ch. 100), relating to intoxicating liquors.—*Commonwealth v. Luddy*, S. J. C. Mass., Feb. 23, 1887; 10 N. E. Rep. 448.

128. JUDGMENT—Collateral — Impeachment — Federal Courts — State Courts — Confiscation — Alien Enemy.—— State courts can examine decisions of federal (inferior) courts as to the jurisdiction of those court, but not as to the correctness of the rulings. Confiscation act of congress of August 6, 1861, and proceedings under it construed. Rights of alien enemy.—*Pasteur v. Lewis*, S. C. La., Jan. 3, 1887; 1 South. Rep. 307.

129. JUDGMENT—Non Obstante Veredicto—Consideration.——Where, on a note, the issues are lack of consideration and of ownership, and on the latter the jury find for plaintiff, and find generally for defendant, a judgment *non obstante veredicto* for the plaintiff will not be granted.—*Andrus v. Childers*, S. C. Oreg., Jan. 26, 1887; 13 Pac. Rep. 65.

130. JUDGMENT — Non-Resident — Attachment — Validity.——A judgment, general in its terms, against a non-resident, is void as a personal judgment, but is valid against property attached in the suit.—*Anderson v. Goff*, S. C. Cal., Feb. 19, 1887; 13 Pac. Rep. 73.

131. JUDGMENT—Setting Aside — Parol Evidence. ——The record of a judgment is conclusive on all parties until altered or set aside by a court of competent jurisdiction, and parol evidence is not admissible in other proceedings to contradict it.—*Richardson v. Beldam*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 191.

132. JUDICIAL MORTGAGE—Statutes.——A judicial mortgage takes effect (in Louisiana) from the recordation of the judgment in the proper parish or county. Art. 555 Code Prac. construed, with reference to civil code.—*Chaffe v. Walker*, S. C. La., Jan. 17, 1887; 1 South. Rep. 290.

133. JURISDICTION—Federal Courts — Parties.—— To give a federal court jurisdiction, the controversy must be between citizens of different States. Parties

must be plaintiffs or defendants according to their interests in the matter, and all parties who are material and necessary must be made parties to the action, and they cannot confer jurisdiction by arranging themselves in an arbitrary manner as plaintiffs or defendants, so as to bring themselves within the rule as to citizenship.—*Bland v. Fleeman*, U. S. D. C. (Ark.), Jan. 20, 188; 29 Fed. Rep. 669.

134. JURISDICTION— Judgment — Federal Courts. ——A federal court has jurisdiction, irrespective of the citizenship of the parties concerned, to prevent, by an exercise of its equity powers, a fraudulent assignment of a judgment rendered on the law side of the same court. Such a proceeding is auxiliary, not original.— *Thompson v. McReynolds*, U. S. D. C. (Ark.), Jan. 20, 1887; 29 Fed. Rep. 657.

135. JUSTICES OF THE PEACE—Adjournment—Discontinuance.——Under Michigan law, a justice cannot adjourn a case against objection without an affidavit, and an adjournment for more than six days is a discontinuance of the case.—*Scullen v. George*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 841.

136. LANDLORD AND TENANT — Improvements.—— Where a landlord makes necessary improvements on property, of which he has made a lease to begin *in futuro*, the tenant is not required to pay for them unless he contracted to do so.— *First Nat. Bk. of Central City v. Lucas*, S. C. Neb., Feb. 24, 1887; 31 N. W. Rep. 805.

137. LANDLORD AND TENANT — Malicious Ejectment.——When a lessor has obtained judgment for possession, the obligation to pay rent ceases. If the lessor accepts rent due and rent in advance, the lease is reinstated. If a writ of ejectment is illegally issued without probable cause, malice will be inferred and the party evicted is entitled to damages.—*Deslonde v. O'Hern*, S. C. La., Jan. 3, 1887; 1 South. Rep. 286.

138. LANDLORD AND TENANT—Sale for Taxes—Adverse Title.——A tenant cannot procure a title adverse to his landlord by purchasing tax titles for taxes levied during his holding.——*Williams v. Towl*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 835.

139. LICENSE—Compensation—Conveyance of Premises.——Where a real estate owner licenses another to remove gravel at a certain price, he may maintain an action therefor, though he has made a conveyance of the land, if he is still the real owner and is in possession of the land, and the record owner assented to the removal of the gravel.—*Barry v. City of Worcester*, S. J. C. Mass., Feb. 23, 1887; 10 N. E. Rep. 186.

140. LIEN — Miner's Lien — Statutes.——California statutes creating a lien in favor of miners and of mechanics for work done on mining claims, construed. What is necessary to set forth in the complaint to make the demand sufficiently clear and certain. California Code Civ. Proc. §§ 1187, 1188.— *Tredinnick v. Red Cloud, etc. Co.*, S. C. Cal., Feb. 21, 1887; 13 Pac. Rep. 152.

141. LIMITATIONS—Statute of — Equity — Quieting Title.——When the bar of the statute of limitations has become absolute, it is as available for aggressive as for defensive purposes. It is not necessary that the party should continue in possession. A bill by tenants in common to quiet title, may, in the discretion of the court, be made to include partition proceedings.— *Jackson v. McDuffie*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 385.

142. MASTER AND SERVANT—Duty of Master—Work Done by Agent—Question for Jury.——It is not a universal rule of law that implied duty rests upon master to furnish suitable means to do his work. It is question for jury, in absence of express contract, whether agent is to furnish materials or not.—*Robinson v. G. F. Blake Mfg. Co.*, S. J. C. Mass., Feb. 23, 1887; 10 N. E. Rep. 314.

143. MASTER AND SERVANT—Negligence—Dangerous Employment—Issues.—The fact of an accident is not a circumstance tending to show negligence. Evidence of a dangerous rate of speed of a train is inadmissible, when there is no issue on that point. The fact, that the work was dangerous cannot be relied upon in an action for negligence, when the employee was aware of it.—*Kuhns v. Wisconsin, etc. R. Co.*, S. C. Iowa, March 1, 1887; 31 N. W. Rep. 868.

144. MASTER AND SERVANT—Discharge—Estoppel. ——Where a servant employed for a year is told by the foreman that he is wanted no longer but to see the employer, goes away without offering to complete his contract, he cannot recover his wages for the balance of the year.—*Collins v. Hazelton*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 843.

145. MASTER AND SERVANT—Railroad — Coupling Cars.——Where an employee in coupling cars was injured, but he had coupled cars similarly loaded before and could see the danger, the master was held not liable.—*Scott v. Oregon R. & N. Co.*, S. C. Oreg., Nov. 30, 1886; 13 Pac. Rep. 98.

146. MECHANICS LIEN — Tenant's Improvements — Covenant—Assignor.——Where the tenant is entitled to payment for his improvements at the expiration of his lease, he has an interest in the land to which a mechanics' lien will attach, under Illinois law; but if he is only to be paid the appraised value of his improvements, and there is no provision making this covenant binding on the assignee of the lessor, he has no interest in the land, as against such assignee, to which such a lien can attach.—*Watson v. Gardner*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 192.

147. MORTGAGE — Acknowledgment — Certificate— Lis Pendens.——An acknowledgment of a mortgage which, by omission of clerk, does not contain the proper statements, in accordance with the memoranda of his deputy, who took it, may be corrected, and the lien thereof is not injured, and no transfers can be made injuriously affecting it, while it is being foreclosed by suit.—*Edmunds v. Leavell*, Ky. Ct. App., Feb. 10, 1887; 3 S. W. Rep. 134.

148. MORTGAGE—Assignment—Record—References. ——A record of an assignment of a mortgage, which is written on the back of the mortgage, describing it as the within mortgage, which is recorded in the same book with the mortgage with cross-references from the record of each to the other, is a legal record thereof. —*Soule v. Colbey*, S. C. Mich., Feb. 10, 1887; 31 N. W. Rep. 785.

149. MORTGAGE — Collateral—Foreclosure—Merger. ——When a mortgage foreclosed by one to whom it was transferred by the mortgagee as a security for his own debt, and he buys the property in, he holds it as he did the mortgage, subject to redemption, unless he had foreclosed his assignor's interest. In such a case, the doctrine of merger does not apply.—*Gilbert v. Thayer*, N. Y. Ct. App., Jan. 18, 1887; 10 N. E. Rep. 148.

150. MORTGAGE — Foreclosure — Taxes Paid. —— Where the taxes assessed are paid on sale under fore-

closure from the proceeds in accordance with the decree, if such taxes are afterwards declared void the sum so paid belongs to the mortgagor.—*Brehon v. Mayor of New York*, N. Y. Ct. App., Jan. 18, 1887; 10 N. E. Rep. 158.

151. MUNICIPAL CORPORATIONS — Contracts—Appropriations.——No expenditure of money for a city of the second class in invalid, unless as appropriation is previously made therefore, except when a vote of the citizens has been taken thereon, and the officers on whose warrant the money is paid are liable therefor. —*City of Blair v. Lautry*, S. C. Neb., Feb. 16, 1887; 31 N. W. Rep. 790.

152. MUNICIPAL CORPORATION—Election—Suscription for Railroad Stock—Injunction.——A private citizen, though a resident, a tax-payer, and an elector, cannot maintain an action in the name of the State upon his relation, to enjoin a canvassing board from canvassing the returns of an election to authorize subscription by a county to the stock of a railroad.—*State ex rel. v. Board of County Commrs.*, S. C. Kan., Feb. 4, 1887; 12 Pac. Rep. 942.

153. MUNICIPAL CORPORATIONS — Lot-Owners — Nuisances—Liability.——Where a person passing along a street is injured by blasting operations in a lot he cannot hold the municipal corporation liable therefor, because it permitted the operations.—*James v. Harrodsburg*, Ky. Ct. App., Feb. 14, 1887; 3 S. W. Rep. 135.

154. MUNICIPAL CORPORATIONS—New Towns—Appointments.——Where a county adopts a township organization, and at the first meeting of the county board thereafter one township is found to have no officers, the county clerk must fill such vacancies by appointment.—*State v. Forney*, S. C. Neb., Feb. 16, 1887; 31 N. W. Rep. 802.

155. MUNICIPAL CORPORATIONS—Opening Streets—Dedication as Public Park— Damages — Instructions. ——On petition for damages for way over petitioner's land, it may be shown that he dedicated it at common law to the public as a park, that it was accepted and so used by public, but not under any statute or town vote. On such petition, jury should be instructed that a benefit may be special, although others are benefited in like manner.—*Abbott v. Inhabitants of Cottage City*, S. J. C. Mass., Feb. 23, 1887; 10 N. E. Rep. 325.

156. MUNICIPAL CORPORATIONS — Public Parks — Appropriations—Bonds.——Stat. Mass., 1875, ch. 185 and Stat. 1886, ch. 304, is not mandatory on city council of Boston to appropriate money or issue bonds to complete a park.—*Boston Water Power Co. v. Mayor of Boston*, S. J. C. Mass., Feb., 1887; 10 N. E. Rep. 318.

157. MUNICIPAL CORPORATIONS — Sewers Surface Water.——Where a municipal corporation takes up the surface water and changes its course, and by an inadequate sewer delivers it injuriously on private property, it is responsible in damages.—*Pye v. City of Mankato*, S. C. Minn., Jan. 31, 1887; 31 N. W. Rep. 863.

158. MUNICIPAL CORPORATIONS—Street Improvements—Void Assessments — Recovery.——A contractor, who has made street improvements, where the contract is decided subsequently to be illegal, and it provided that the contractor should only look to the assessmentsonthe property, can take up his work upon refunding all payments made to him.—*Hahn v. Trustees of Town of Bellevue*, Ky. Ct. App., Feb. 15, 1888; 3 S. W. Rep. 132.

159. MUNICIPAL CORPORATIONS—Subscriptions—Ultra Vires.——Where municipal corporation subscribes to a company for building new locks under a law, but the project is soon abandoned, the subscription cannot be enforced.—*Jessamine Co. v. Swegert*, Ky. Ct. App., Feb, 5, 1887; 3 S. W. Rep. 13.

160. MUNICIPAL CORPORATIONS— Tort — Presentation of Claim—Defective Ways—Repairs—Appeal.—— A claim for damages for a tort need not be presented to city officers to be audited. Cities and towns liable to action for neglect of officers. Proof that officers had been in the habit of repairing a cross-walk will suffice to charge the city with its maintenance. The fact that the cross-walk was part of a common thoroughfare alleged in the complaint will be presumed sufficient after verdict.—*Sheridan v. City of Salem*, S. C. Oreg., Dec. 21, 1886; 12 Pac. Rep. 925.

161. NEGLIGENCE—Blind Person.——Whether one who leaves a trap-door in a sidewalk open, unguarded, and unattended, is guilty of negligence, is a question for the jury. It is not necessarily negligence for a blind man to walk the streets of Boston unattended.—*Smith v. Wildes*, S. J. C. Mass., Feb. 23, 1887; 10 N. E. Rep. 446.

162. NEGLIGENCE— Contributory— Child.——When a child seven years old fell down a steep place on a lot in the rear of her house, separated therefrom by a picket fence with a gate, built by defendant's employees some years before, and there was no evidence the defendant ever owned occupied or in any way used the property, or invited the child thereon, there was no cause for action.—*Galligan v. Metacomet M. Co.*, S. J. C. Mass., Feb. 23, 1887; 10 N. E. Rep. 171.

163. NEGLIGENCE— Evidence.——Where defendant was driving a horse with a long chain dragging behind him, on which plaintiff's horse stepped, whereby the horse was injured, and which chain plaintiff did not see, a verdict for the plaintiff was warranted.— *Bueck v. Lindsay*, S. C, Mich., Feb. 10, 1887; 31 N. W. Rep. 768.

164. NEGLIGENCE — Damages— Injuries — Occupation—No License.——In a suit for personal injuries by one who delivered women and nursed them, the value of her services as a midwife when she has no license, may be excluded from, and the value of her services as nurse, etc., may be submitted to the jury.—*Chicago, W. D. R. Co. v. Lambert*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 219.

165. NEGLIGENCE — Railroad—Crossing—Contributory Negligence—Jury.——In a suit for killing a man at a street crossing, all the facts as to the management and speed of the train, are for the jury to determine and whether the defendant exercised due care, what precautions they should have exercised at such a place, and whether the deceased was in fault. *Bolinger v. St. Paul & D. R. Co.*, S. C. Minn., Feb. 11, 188; 31 N. W. Rep. 856.

166. NEGLIGENCE —Railroads—Killing Stock—Kentucky Law.——Under the Kentucky law, it devolves upon the railroad to show that the killing of the stock was unavoidable and the uncontradicted statements of the railroad employees on that point does not raise any presumption that they testified falsely.—*Grundy v. Louisville, etc. R. Co.*, Ky. Ct. App., Jan. 27, 1887; 2 S. W. Rep. 899.

167. NOTARY PUBLIC — Seal—Town Plat—Dedication.——The Nebraska law does not require the name or initials of a notary to be engraved in his seal. A town plat acknowledged and recorded by the owners

is a dedication in fee simple to the public of all land marked thereon for public use.—*Village of Weeping Water v. Reed*, S. C. Neb., Feb. 16, 1887; 31 N. W. Rep. 797.

168. OFFICE — Salary — Reduction of.——It is not competent, in Mississippi, for county supervisors to abolish the office of health officer by reducing the salary to a merely nominal amount. Such a reduction is a mere evasion of their duty of fixing the compensation of the officer.—*Board of Supervisors, etc. v. Westbrook*, S. C. Miss., Feb. 14, 1887; 1 South. Rep. 352.

169. PARTITION—Judgment—Subsequent Term.——Where, after a sale in partition, a final order of distribution is made, an order on motion at a subsequent term by a different judge, modifying the order of distribution, is a nullity.—*Fredericks v. Davis*, S. C. Mont., Jan. 27, 1887; 13 Pac. Rep. 125.

170. PARTITION — Plaintiff's Title — Possession.——One out of possession of real estate cannot ask for partition thereof against the party in possession claiming title. Where plaintiff's title is denied or is not clear, the court will retain the partition suit, until that point is decided in an action at law; but not so, where it is apparent that he has no title.—*Seymour v. Ricketts*, S. C. Neb., Feb. 15, 1886; 31 N. W. Rep. 781.

171. PARTNERSHIP — Assets—New Firm — Limitations.——Where a new firm takes the assets of the old firm and assumes its debts, it becomes a trustee for the creditors of the old firm, and the statute of limitations does not apply, and the creditors of the new firm are confined to what remains, after paying the creditors of the old firm.—*Bowman v. Spalding*, Ky. Ct. App., Feb. 5, 1887; 2 S. W. Rep. 911.

172. PAYMENTS—Appropriation of.——The rule is that the debtor or party paying may direct the appropriation; if he does not the creditor may designate to which of two or more debts the payment shall be applied: neither party can do so after a controversy has arisen between them; and if neither indicates, in due time, the destination of the money, the court will do so "according to its own notions of justice."—*Kinkel v. The Martha*, U. S. D. C. (N. Y.), Jan. 17, 1887; 29 Fed. Rep. 708.

173. PERSONALTY — Ownership — Evidence. —— Possession of personalty under claim of title for a year or more is *prima facie*, but not conclusive evidence of ownership.—*Trevorrow v. Trevorrow*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 908.

174. PLEADINGS—Assumpsit—Money Received.—— In an action for money had and received, it is sufficient that defendant received plaintiff's money, which he ought not to retain.—*Walker v. Conant*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 786.

175. PLEADINGS — Bankruptcy — Discharge. ——In pleading a discharge in bankruptcy, not necessary to allege court had jurisdiction.— *Reidhar v. Pfeiffer*, Ky. Ct. App., Feb. 5, 1887; 3 S. W. Rep. 3.

176. PLEADING—Complaint — Defense.—— A complaint should not anticipate the defense, but when the defense is a release indorsed on the note in suit, it is allowable.—*Latta v. Miller*, S. C. Ind., Jan. 27, 1887; 10 N. E. Rep. 100.

177. PLEADINGS—Damages — Vicious Animals.—— In an action for damages caused by a vicious animal, it is only necessary to allege that defendant kept the animal knowing it to be vicious.—*Brooks v. Taylor*, S. C. Mich., Feb. 15, 1887; 31 N. W. Rep. 837.

178. PLEADING—Patents — Multifarious Bill.—— A bill in equity is multifarious which in one action charges the defendant with infringing five patents containing sixteen claims.—*Griffith v. Segar*, U. S. C. C. (N. Y.), Feb. 5, 1887; 29 Fed. Rep. 707.

179. PLEADING—Plea in Abatement—Prior Action. ——A plea in abatement of a prior action must show that an action is pending between the same parties for the same cause.—*Bryan v. Scholl*, S. C. Ind., Feb. 2, 1887; 10 N. E. Rep. 107.

180. POST-OFFICE—Opening Letters—Statute—Construction.——What the words "in care of" mean. U. S. Rev. Stat. § 3892, concerning the offense of opening the letters of other persons, construed.—*United States v. Hilbury*, U. S. D. C. (S. Car.), Jan. 11, 1887; 29 Fed. Rep. 705.

181. POST-OFFICE—Registered Letters — Statutes. ——A postmaster who takes money from a registered letter, either for the purpose of stealing or "borrowing" it, is guilty of violating § 5467 of the Revised Statutes of the United States.—*United States v. Thompson*, U. S. D. C. (S. Car.) Jan. 14, 1887; 29 Fed. Rep. 706.

182. POWERS—Testamentary — Life Estate — Conveyance in Fee.——Where by will a trustee is authorized to convey the property on written request of the tenant for life, and to dispose of it upon her decease, according to her will, or in case of her dying intestate to hold it for the next of kin, he may, upon her written request, convey the property in fee simple.—*Weed v. Knox*, S. C. Ga., Jan. 18, 1887; 1 S. E. Rep. 167.

183. PRACTICE—Answer — Demurrer — Amending Complaint—Exceptions.——When a demurrer to an answer is sustained, the defendant will not lose the benefit of his exceptions thereto, though the plaintiff amends his petition, when the answer is not refiled and no objection is made by the plaintiff therefor in the trial court.—*Cottrell v. Nixon*, S. C. Ind., Feb. 3, 1887; 10 N. E. Rep. 122.

184. PRACTICE— Appeal — Amended Abstract.—— Where an amended abstract is filed by the appellee, showing that there was no bill of exceptions, and the correctness of the amended abstract is not denied, the judgment will be affirmed.—*Foley v. Hefferon*, S. C. Iowa, March 1, 1887; 31 N. W. Rep. 877.

185. PRACTICE—Appeal—Assignment of Errors.—— Where several exceptions set up independent objections to the petition, to be considered, they must be separately specified in the assignment of errors.—*Cannon v. Cannon*, S. C. Tex., Nov. 12, 1886; 3 S. W. Rep. 36.

186. PRACTICE — Appeal — Final Judgment.—— Where a decree ordering a sale of property was appealed from and subsequent decrees were made about the distribution of the property, the last decree was the final judgment, and no bill of exceptions was required to save the appeal.—*Fredericks v. Davis*, S. C. Mon., Jan. 19, 1887; 13 Pac. Rep. 124.

187. PRACTICE—Appeal— Statement of Facts—Filing.——Under rules of court, statements of facts filed more than ten days after adjournment of court will not be considered.—*Berryman v. Schumacher*, S. C. Tex., Feb. 1, 1887; 3 S. W. Rep. 46.

188. PRACTICE—Assignment of Errors — Generality. ——An assignment of error, that judgment is not supported by the evidence and not in accordance with allegations of the plea in the reconvention, but not stating in what respect, is too general to be considered.

Garcia v. Gray, S. C. Tex., Jan. 28, 1887; 3 S. W. Rep. 42.

189. PRACTICE — Change of Venue—Waiver.—— A change of venue to another court having jurisdiction by consent, is a waiver and estops all parties from objecting.—*Center Tp. Marion Co. v. Bd. of Commrs.*, S. C. Ind., Feb. 5, 1887; 10 N. E. Rep. 291.

190. PRACTICE — Continuance — Absent Witness—Affidavit.——A first application for a continuance, on the ground that the witness is sick and unable to attend and has been served with a subpœna, should be granted, and it is not irregular for an agent of the party to make the affidavit.—*Blum v. Bassett*, S. C. Tex., Dec. 21, 1886; 3 S. W. Rep. 33.

191. PRACTICE—Ejectment — Judgment — Description.—— A judgment in ejectment describing it by notes and bounds will be sustained, though the petition did not so describe it, where it appears a survey was ordered and filed.—*Johns v. McCallough*, Ky. Ct. App., Jan. 29, 1887; 2 S. W. Rep. 912.

192. PRACTICE — Exceptions — Instructions — Evidence.——A bill of exceptions not part of record on appeal, unless presented to trial judge in time allowed. Case will not be reversed for instructions if evidence not in record, unless radically wrong by any supposable case.—*Joseph v. Mather*, S. C. Ind., Jan. 13, 1887; 10 N. E. Rep. 78.

193. PRACTICE—Instructions.——An instruction as to the damages, if the plaintiff is entitled to recover, is not erroneous as omitting the question of plaintiff's negligence, provided other instructions properly present the questions.—*Penn. Co. v. Marshall*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 220.

194. PRACTICE—Judgment—Review — Complaint — Demurrer.——A complaint for review of a judgment, where order granted was charged without notice, is good on demurrer.—*McArthur v. Leffler*, S. C. Ind., Jan. 25, 1887; 10 N. E. Rep. 81.

195. PRACTICE—Jury — Impaneling.——Where the court improperly caused certain jurors not to be called, yet it is no ground for reversal if the jury selected was from the regular list of jurors.—*City of Abilene v. Hendricks*, S. C. Kan., Feb. 4, 1887; 13 Pac. Rep. 121.

196. PRACTICE — Justice — Appeal — Judgment by Consent.——Where a case is appealed from a justice with an agreement that other cases pending before the justice shall depend upon the appealed case and similar judgments be entered on them in the appellate court, such court cannot enter such judgment, the cases not being before it.—*Woodruff v. Bass*, S. C. Tex., Feb. 1, 1887; 3 S. W. Rep. 48.

197. PRACTICE—Justice — Appeal — New Trial.—— Where, on appeal from a justice, a judgment is rendered for the same amount and interest thereon added and costs, it is not a new judgment in contravention of the Wisconsin laws not allowing a new trial, where the judgment of the justice does not exceed fifteen dollars.—*Wold v. Ordway*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 759.

198. PRACTICE—Justice — Appeal — Signature. —— Other attorneys than those who appeared before the justice may sign the notice of appeal.—*Totten v. Sup. Ct. Sonoma Co.*, S. C. Cal., Feb. 17, 1887; 13 Pac. Rep. 72.

199. PRACTICE—Order — Appeal.——When a party appeals from an order requiring him to do certain things, and when the order is affirmed on appeal, the time for obedience has expired, the trial court upon cause shown may grant him leave to comply with the order, but the appellate court cannot.—*Whereatt v. Ellis*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 762.

200. PRACTICE—Venue — Non-Residents — Written Contracts.——The law of Iowa that non-residents may be sued on written contracts in the county in which the contracts are to be performed, applies only to written instruments signed by the defendants.—*Wright & L. O. & L. M. Co. v. Kleigel*, S. C. Iowa, March 2, 1887; 31 N. W. Rep. 878.

201. PRINCIPAL AND AGENT.——Questions of fact only involved. Judgment affirmed.—*Smith v. De Leon*, S. C. La., Jan. 4, 1887; 1 South. Rep. 304.

202. PRINCIPAL AND AGENT — Corporation.—— Those who make a contract with the agent of a corporation for the sale of lands to such corporation, are bound to ascertain for themselves whether he has the power under the constitution and by-laws of the corporation to make the purchase.—*Bocock v. Alleghany, etc. Co.*, S. Ct. App., Va., Feb. 7, 1887; 1 S. E. Rep. 325.

203. PRINCIPAL AND AGENT—Husband and Wife. ——A wife is liable for debts contracted by her husband upon her credit, after the termination of the agency under which he had been for a number of years carrying on her farm as her general agent, unless notice that the agency has been terminated can be brought home to the creditor.—*Foster v. Jones*, S. C. Ga., Feb. 1, 1887; 1 S. E. Rep. 275.

204. PRINCIPAL AND AGENT—Real Estate—Authority.——An agent employed to lease or sell property cannot authorize an adjoining proprietor to change the boundary or fences.—*Fore v. Campbell*, S. C. App. Va., Jan. 27, 1887; 1 S. E. Rep. 180.

205. PRINCIPAL AND SURETY— Breach—Lien.—— A surety is bound exactly as the bond states, and a provision against liens is not broken by claims which are not perfected as liens.—*Simondson v. Thori*, S. C. Minn., Feb. 21, 1887; 31 N. W. Rep. 861.

206. PRINCIPAL AND SURETY—Who are Principals—Remedy of Surety for Reimbursing — Third Person—Suit by Administrator — Competency of Witness — When Statute of Limitation Begins to Run— Commissioners Report.——Where bond is signed by several persons with word "security" opposite several, names all others are presumably principals. A surety may recover from principals where he repays third party who paid obligation. Where two parcels of land are sold to satisfy different liens, it is immaterial to debtor how proceeds are applied in satisfying those liens, provided they are satisfied. A co-surety is not a competent witness against plaintiff, in action by administrator of a surety against the principals and a co-surety, to show that other defendants sued as principals were not such. Statute of limitations begins to run upon a surety's claim for reimbursement from time that money is actually paid. Under Virginia code, commissioner in equity suit is not obliged to return evidence of a fact reported, without special request.—*Harper v. McVeigh*, S. Ct. App., Va., Jan. 13, 1887; 1 S. E. Rep. 193.

207. PROMISSORY NOTE—Corporations—Officer Signing.——Where a note is signed by name of a corporation and below that name that of a person with the word "pres." appended, such person is personally liable, the word "pres." being held to be merely descriptive of the person.—*Heffner v. Brownell*, S. C. Iowa, March 2, 1887; 31 N. W. Rep. 947.

208. PROPERTY—School-house on Land of Another. ——Where A built a school-house under contract and bought the land according to agreement upon which the house was built, and assisted in town-meetings concerning it, the evidence warrants the submission to the jury whether, between A and the town, it belongs to the latter as personal property.—*Batcheller v. Commercial Union Assur. Co.*, S. J. C. Mass. Feb. 23, 1887; 10 N. E. Rep. 321.

209. PUBLIC LANDS— Pre-emption — Mortgage — Statute—Appeal.——The words "grant or conveyance," in U. S. Rev. Stat. § 2262, includes mortgages. All such instruments affecting pre-empted lands before final receipts are void, except in the hands of *bona fide* purchasers for value. A "water-ditch" appurtenant to land mortgaged, if not mentioned in the mortgage cannot be affected by its foreclosure. Upon appeal, insufficiency of evidence alleged as a ground for new trial cannot be considered, unless specific deficiency appears in the record.—*Bass v. Baker*, S. C. Mon., Jan. 24, 1887; 12 Pac. Rep. 922.

210. RAILROAD — Eminent Domain. —— Upon the facts shown by the record the court declined to enjoin the construction of a railroad as being too near the buildings of the university of Minnesota.—*University, etc. v. St. Paul, etc. Co.*, S. C. Minn., Feb. 28, 1887; 31 N. W. Rep. 936.

211. RAILROAD — Taxation —Fraud.——Statutes of Illinois, concerning taxation of railroads, construed. Fraud is a conclusion of law, and the party charging it must set out the facts upon which he seeks to support his allegations.—*East St. Louis, etc. Co. v. People ex rel.*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 397.

212. REPLEVIN — Pleading—Local Action—Header. ——An action for the recovery of a header is local and must be brought where the property is detained, and it must be so alleged in the petition.—*Moorhouse v. Donica*, S. C. Oreg., Jan. 24, 1887; 13 Pac. Rep. 112.

213. SALE—Action—Affidavit of Defense.——An affidavit of defense alleging that casks of beer sold and sued for did not contain the quality charged, is a sufficient affidavit of defense, under the Pennsylvania practice.—*Betz v. Shepperson*, S. C. Penn., Feb. 7, 1887; 8 Atl. Rep. 175.

214. SALE OF LAND—Statute of Frauds—Escrow—Appeal.——When, by parol, a contract has been made to exchange land for personal property, the execution and deposit of a deed in escrow does not take the case out of the statute of frauds. The request of counsel in the trial court to find a certain fact *as* a fact, and a certain consequence as a conclusion of law from that fact, is suitable matter to be considered upon appeal, if it appears in the bill of exceptions. — *Popp v. Swauke*, S. C. Wis., March 1, 1887; 31 N. W. Rep. 916.

215. SALES — Warranty — Waiver —Breach—Notes. ——Where on a sale purchaser retains the property and executes his notes for the purchase price after knowledge of breach of warranty, on the promise of seller to remedy the defects, he can off-set his damages against a suit on his notes.—*Aultman v. Hefner*, S. C. Tex., Nov. 26, 1886; 2 S. W. Rep. 861.

216. STATUTES — Construction — Common Law — Idaho.——Under Idaho law, statutes in derogation of the common law are to be liberally construed.—*Darly v. Heagerty*, S. C. Idaho, Feb. 14, 1887; 13 Pac. Rep. 85.

217. SUBSCRIPTION—Offer—Acceptance.——A gratuitous subscription signed by only one person may be withdrawn at any time, until accepted in express terms or its conditions have been performed.—*Broadbent v. Johnson*, S. C. Idaho, Feb. 24, 1887; 13 Pac. Rep. 83.

218. SUNDAY — Negligence — Necessity. —— Where plaintiff is injured on Sunday by defendant's failure to keep its streets in order, plaintiff is not required to show he was engaged in a work of necessity.—*Black v. City of Lewiston*, S. C. Idaho, Feb. 7, 1887; 13 Pac. Rep. 80.

219. TAXATION—Exemption—Constitutional Law—Statutes.——Statutes of Michigan, exempting from taxation the property of certain railroad companies, construed, and held constitutional as the exemption was created prior to the existing constitution.—*In re Proceeding for Collection of Taxes, etc.*, S. C. Minn., March 2, 1887; 31 N. W. Rep. 942.

220. TAXATION— Interstate Commerce — Constitutional Law.——A State can tax personal property belonging to non-resident persons used within the State for purposes of interstate commerce, such taxation being proportioned to the use made within the State of such property, and not based upon its entire and absolute value. The owner of the property cannot enjoin the collection of such a tax from his bailee.—*Pullman, etc. Co. v. Twombly*, U. S. C. C. (Iowa), Jan. 14, 1887; 29 Fed. Rep. 658.

221. TAXATION — Statutes — Construction.——New Jersey statute March 23, 1881, (P. L. 1881 p. 194). It does not give the court power to tax or assess, but only to apply existing laws.—*State v. Mayor of Patterson*, S. C. N. J., Feb. 17, 1887; 8 Atl. Rep. 113.

222. TAXATION — Voluntary Payment.——When a party pays taxes under protest prior to the time when the treasurer could compel payment, the money cannot be recovered back.—*Baker v. Big Rapids*, S. C. Mich., Feb. 10, 1888; 31 N. W. Rep. 810.

223. TAXATION—Mortgage—Sale— Deed.——A deed and a certificate, reciting that a mortgage on described premises had been assessed to the owner, and that said property was sold for taxes, recites a sale of the land.—*Doland v. Mooney*, S. C. Cal., Feb. 17, 1887; 13 Pac. Rep. 71.

224. TELEGRAPH COMPANY — Mistake. ——A telegraph company is liable for a mistake in unrepeated messages, if the receiving operator asks the sending office whether the number given is correct and is answered "yes." And this is true, although there is a notice on the blank used that the company will not be responsible for errors in unrepeated messages.—*Western, etc. Co. v. Richman*, S. C. Penn., Feb. 7, 1887; 8 Atl. Rep. 171.

225. TRIAL—Findings — Mortgage Redemption.—— Whether findings by the court are within the issue depends upon the pleadings, not upon the recitals of the decree. Junior mortgagees, though made parties to foreclosure proceedings, are not bound by the decree, but may redeem from the mortgagee regardless of the decree.—*Johnson v. Hosford*, S. C. Ind., Feb. 17, 1887; 10 N. E. Rep. 407.

226. TRIAL—Instruction — Appeal — Aider by Verdict.——Upon a trial, the instruction need not state that which the jury must needs find if they believe the evidence. Upon appeal it is no objection to an instruction that it did not direct that which the verdict shows they did do without the direction. When a doubtful instruction will be aided by verdict. ——

Walthem v. Arts, S. C. Iowa, March 3, 1887; 31 N. W. Rep. 953.

227. TROVER —Tenant in Common.——A tenant in common of hay is liable in trover to his co-tenant if he uses it, but he is not liable in trover if he sells it.—*Lewis v. Clark*, S. C. Vt. March 3, 1887; 8 Atl. Rep. 158.

228. TRUST — Charity — Perpetuity — Certainty — Declaration.—— The rule against perpetuities is not violated when one charitable trust is limited to take effect after or in lieu of another. A trust is not abrogated by the fact that the trustee of a civil corporation refuses to execute it. There is sufficient certainty in a trust for "indigent young men," preparing for the "evangelical" ministry. After the disclaimer of the corporation the property remains clothed with the trust.—*Trustees, etc. v. Whitney*, S. C. Conn., Jan. 26, 1887; 8 Atl. Rep. 141.

229. USURY—National Banks—Creditor.——A creditor of a person who has paid usurious interest to a national bank is not entitled to recover it back, as he is not a representative of the party paying, within the meaning of Rev. Stat. U. S. § 5198.—*Barrett v. Shelbyville, etc. Bank*, S. C. Tenn., Feb. 17, 1887; 3 S. W. Rep. 117.

230. VENDOR'S LIEN — Priority—Wages—Appeal—Waiver.——A vendor's lien for purchase money is superior to the claims of servants for wages earned by caring for the property on which the lien attached. One who on appeal prays for the reversal of a judgment on its merits, waives thereby any demand for a reversal on the ground of misjoinder.—*World's, etc. Exposition v. North, etc. Exposition*, S. C. La., Jan. 3, 1887; 1 South. Rep. 358.

231. VENDOR AND VENDEE—Improvements.——In West Virginia, one upon eviction is not entitled to be compensated for improvements unless he believed when he made them that he was holding under a good title. Ruling as to rents and profits.—*Cain v. Cox*, S. C. App. West Va., Nov. 25, 1886; 1 S. E. Rep. 298.

232. VENDOR AND VENDEE—Title Bond—Assignee—Trespass.——One who give a title bond cannot sue a trespasser by a surrender to him of the title bond by the obligee after the latter has assigned all his property for the benefit of creditors.—*Jones v. Langdon*, Ky. Ct. App., Feb. 12, 1887; 3 S. W. Rep. 129.

233. WATERS—Surface Water—Railroad.——Falling rains and melting snows constitute surface water, and a railroad is not responsible in damages for obstructing by its embarkment the escape of such waters, if no *natural* water-course was obstructed.—*Hill v. Cincinnati, etc. Co.*, S. C. Ind., Feb. 16, 1887; 10 S. E. Rep. 410.

234. WAYS—Highways — Petition.——A municipal corporation may, upon proper petition, discontinue a street, and a *certiorari* will not lie to prevent it. Nor is the legality of its action affected by the fact that third persons pay the expenses of the proceeding, nor the fact that no damages were assessed.—*Pillsbury v. Mayor of Augusta*, S. J. C. Me., Feb. 5, 1887; 8 Atl. Rep. 150.

235. WILL—Remainder.——Under a devise of land for life to testator's widow, remainder to the "heirs of his body," the remainder vests at the death of the testor in all such heirs as are then living, such persons take under the will and not by descent.—*McDaniel v. Allen*, S. C. Miss., Feb. 14, 1887; 1 South. Rep 356.

236. WILL — Survivorship — Remainder.——Wills should be so construed as to favor the vesting of estates. Words of survivorship, unless a contrary intention clearly appears, refer to the time of testator's death. A devise to a wife for life, after her death to a daughter in fee, but if she be not then living "then to her heirs forever," this devise is held to give the daughter, at the testator's death a vested remainder in fee.—*Harris v. Carpenter*, S. C. Ind., Feb. 19, 1887; 10 N. E. Rep. 422.

237. WILL—Trust — Trustees.——A will provided that the estate devised to a daughter for life should, after her death, be divided into sixteen parts and distributed among certain named parties. It further provided that the "above named devisees" should nominate trustees to fill vacancies. These words included the remaindermen only. The probate court should, under such a will, appoint as trustees to fill vacancies, persons suitable for such trust nominated according to the provisions of the will.—*Appeal of Wilcox*, S. C. Conn., Dec. 29, 1886; 8 Atl. Rep. 136.

238. WITNESS—Deposition — Notary Public. ——In Nebraska, each party may be required by the other to testify like any other witness, and may be compelled to give his deposition. A notary public may commit for contempt a party who refuses to give his deposition when duly summoned and required to do so.——*Dogge v. State*, S. C. Neb., Feb. 24, 1887; 31 N. W. Rep. 929.

239. WITNESS—Practice—Agency—Evidence—Mortgage.——To exclude the testimony of a party to transactions with deceased party, the excluding facts must appear clearly and affirmatively. When is it the duty of the court to strike out testimony? Agency to ship cotton does not include authority to receive payment. The custom of agent as shipper for other persons does not bind a shipper who has not acquiesced in such custom. A consignee cannot relieve himself of liability for cotton sold by crediting the agent. An agreement by a mortgagee to pay off a prior mortgage is performed by buying in the property.—*Hill v. Helton*, S. C. Ala., Jan. 5, 1887; 1 South. Rep. 340.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query No. 16. Husband and wife occupied premises in Missouri as a homestead. The wife was divorced for his misconduct, and was awarded alimony in gross. The only minor child has lived with the wife since the separation. The husband has been in possession since the divorce with no one except a hired servant, whom he married after the divorce. The husband has no other property. Are the premises exempt from execution for the alimony? Cite authorities. M.

Query No. 17. Under the statutes of Kansas, can the husband of the daughter of a deceased person acquire a tax deed to deceased's land? F.

Query No. 18. A dies intestate, leaving two sons and one daughter. In his lifetime he purchased for

his sons some stocks. In his ledger account he charges said sons with the amount of the purchases and the assessments on the stocks, and he *pays them the dividends* declared on the stock. In partitioning A's estate among his three children, should the said amounts of stock purchases be considered as advancements or loans or gifts? Please cite auteorities.

H. C.

QUERIES ANSWERED.

Query No. 6. [23 Cent. L. J. 46.] A, B, C, and others, sign a petition for dram-shop license under the provisions of § 5442, R. S. 1879, amended 1883; petition is filed in advance of time required by law. A, B and C, desire afterwards to have their names erased from, or held for naught, in said petition. Will the filing of a counter-petition or written order to the court by them for this purpose before action had in original petition, effect this? No strict rule of pleading required in county courts. H.

Answer. The filing of the counter-petition by A, B and C, nullifies this earlier signatures, and makes them remonstrants. Richman v. B'd of Sup'rs Muscatine Co., S. C. Iowa, Dec. 1885; 26 N. W. Rep, 24.

Query No. 33. [23 Cent. L. J. 576.] A private corporation advertises for bids on an important work, in the usual form, "reserving the right to reject any and all bids," but opens the bids privately, no bidders being present, refuses to announce the respective bids, and awards the contract to a bidder who agrees with the company not to make public the contract price. Under such circumstances, has the lowest bidder any remedy at law by which he can recover his expenses and expected profits, or is the case one of *damnum absque injuria*? ENQUIRER.

Answer. To make a contract, both parties must assent to all the terms. When a person reserves the right to reject all bids, he may contract with whom he pleases. Such propositions are considered rather as invitations than as offers. Addison on Contracts (1883) 35*n*, and cases cited. The lowest bidder has no remedy.

Query. No. 30. [23 Cent. L. J. 479.] A brings replevin against B for a piano. B executes a retaining bond and retains the piano. Pending the action, B sells the piano to C. At the trial, judgment is rendered in favor of A, that he recover the piano or $200, its value. Execution is issued to sheriff for the piano or its value and he takes the piano from C's possession. Is he a trespasser in doing so? Did B's retaining bond relieve the piano of A's claim of ownership, so as to pass a good title to C or not? P.

Answer. The old rule of law was that, after the institution of a suit, no transfer of property, which was directly affected by that suit, could affect the result of the suit. That law must be considered to be in force, where, as in replevin suits, the judgment may be for a return of the property. The sheriff can lawfully levy on the piano in C's possesssion, and sell it to satisfy the execution. The following decisions are directly in points: Pope v. Jenkins, 30 Mo., 528; Hawkins v. Taylor, 15 Mo. Ap., 238; Bruner v. Dyball, 42 Ill., 34.

Query No. 28. [23 Cent. L. J. 431.] Section 1776, R. S. says: "Any affidavit or information may be amended in matters of form of substance, at any time, by leave of court before the trial and on the trial as to all matters of form and variance at the discretion of the court." What is the difference between an amendment as to "form or substance," and an amendment as to "form and variance"? H.

Answer. We cannot tell how the section has been construed, because we do not know from the law of what State it has been taken. The same section in R. S. Mo., 1879, refers to a different matter. We suppose any amendment may be allowed before trial that the party believes to be proper. Amendments to the trial must be intended to correct errors in form, and to make the paper conform to the truth, as shown by the evidence.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF LIS PENDENS, or the Effect of Jurisdiction on Property Involved in Suit. By John I. Bennett, LL. D., Chicago: E. B. Myers and Company, 1887.

We have long entertained the opinion that the profession needed a good text-book on the subject of Lis Pendens, and at one time contemplated the execution of such a work ourselves. We, therefore, regard the work which Dr. Bennett offers us as a timely and welcome addition to legal literature. In some of the States, there are statutes which more or less completely cover the subject, and in others the courts are controlled only by the common law. It therefore follows that there exists in the different States considerable diversity in the rulings on this important branch of the law, and as it often becomes necessary to consider in one State the law, and practice in another, it is highly desirable to have a book which presents the whole subject from one point of view. This Dr. Bennett's learned and elaborate work has very thoroughly done, and his careful and exhaustive exposition of the law leaves nothing to be desired.

We are satisfied that the work will be fully approved by the profession, and that it deserves a place in the library of every practitioner.

QUESTIONS AND ANSWERS ON MUNICIPAL LAW, containing about One Thousand of the most Important Questions Propounded to Law Students, both at the New York Supreme Court, and Columbia College Law School Examinations; embracing the following subjects: Contracts; Real Property; Patents; Copyrights and Trade-marks; Torts; Shipping and Insurance; Criminal Law; Equity; Evidence; Pleading and Practice; at Common Law and under Codes of Civil Procedure. By George Gardiner Fry, L. L. B., Member of the New York Bar. New York: L. K. Strouse & Co., Law Publishers, 95 Nassau Street. 1887.

The design of this work is very fully expressed in the title page, which we have copied. The author informs us in his preface, that it is founded upon the prize examination papers used in the Columbia College Law School, and the questions used by the examiners of the supreme court of the State of New York. We find that to each answer is appended citations of the authorities upon which it is founded. We have no doubt that the work will be found very useful to law students, especially in New York, and in a slightly less degree to those resident in other States